THE MEDIATION PROCESS

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MEDIATION TRAINING JUNE 2016

Chicago

I. **Introduction:** This article will cover the mediation process, the law involved and the types of mediation.

II. **Law:** First, determine the law in your jurisdiction. I am a Texas lawyer so Texas law is what I know. Yes, there are the ABA Model Rules for Mediation of Client-Lawyer Disputes adopted by the ABA on Aug. 4, 1998, and the Model Standards of Practice for Family and Divorce Mediation, approved by the ABA House of Delegates on February 2001. But the law of your state is what you must know and follow.

In Texas the laws governing all mediations are found in the Civil Practice and Remedies Code Sections 154.051-154.073. Section 154.052 describes what is legally required to serve as a mediator. The Texas Family Code has laws specific to family law mediations, which states in part that a mediated settlement agreement is binding on the parties if the agreement:

1. "Provides, in a prominently displayed statement that is boldfaced type or capital letters or underlined that the agreement is not subject to revocation. It typically looks like this- **THIS AGREEMENT IS NOT SUBJECT TO REVOCATION.** (I tell people that if they sign the Mediated Settlement Agreement, they are stuck with it. There are no do over's.)
2. "Is signed by each party to the agreement: and
3. "Is signed by the party's attorney, if any, who is present at the time the agreement is signed.

"If the mediated settlement agreement meets the above requirements, a party is entitled to judgment on the mediated settlement agreement notwithstanding Rule 11, Texas Rules of Civil Procedure, or another rule of law." Texas Family Code Section 6.602.

The Texas Supreme Court approved ETHICAL GUIDELINES FOR MEDIATORS, Misc. Docket No. 11-9062 on April 11, 2011.

Determine if your state has ethical guidelines for mediators whether in the form a statute, a court order or a mediator organization. Should a mediator give legal advice? In most states, the answer is no.

III. **Mediation Process: "**Discourage litigation. Persuade neighbors to compromise whenever you can. Point out to them how the nominal winner is often the real loser- in fees, expenses, and a waste of time. As a peacemaker, the lawyer has a superior opportunity of becoming a good [person]." Abraham Lincoln, *Notes for a law lecture,* July, 1850

IV. **What is Mediation:** Mediation is a confidential process in which a qualified mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute. In Texas there is an exception to the confidential aspect of mediation if a mediator learns of child abuse or elder abuse. Are there exceptions in your state?

The mediator is a third-party neutral who helps the parties and their lawyers reach an agreement. The mediator cannot impose a ruling like a judge or arbitrator. The mediator cannot force the parties to sign an agreement.

V. Essential Elements of Mediation: **"**When lawyers explain ADR options to clients, they often find that there is considerable confusion about the meaning of 'arbitration' versus 'mediation.' One shorthand explanation states that arbitration is 'private adjudication,' while mediation is 'facilitated negotiation.'

"Mediation has the following other core characteristics as well:

1. *Self-determination*-the parties, not the mediator, decide whether to settle and, if so, on what terms.
2. *Voluntariness*-participation in most mediations is voluntary, and, even cases where a court refers the parties to mediation, they have the right to leave after making a good-faith effort to resolve their conflict.
3. *Informed consent*-the parties are entitled to have all relevant information that they need in order to make an informed decision about settlement.
4. *Confidentiality*-with a few exceptions (such as public policy mediations involving governmental agencies), the discussions that take place in mediation are protected from disclosure by a statutory privilege and the parties' contractual Agreement to Mediate, which typically includes a provision prohibiting the parties and the mediator from disclosing the substance of their discussions." David A. Hoffman and Boston Law Collaborative, LLC, *Mediation: A Practice Guide for Mediators, Lawyers, and Other Professionals*, Boston 2013, Massachusetts Continuing Legal Education Inc. pp. 1-7, 1-8, hereinafter referred to as Hoffman, *Mediation.*

VI. Styles of Mediation: There are two basic styles of mediation, facilitative and evaluative.

1. Facilitative-"Mediators who use a facilitative style are not seeking to direct the outcome, but only to enable the parties to reach an outcome that meets their needs and goals. These mediators resist answering the following types of questions from the parties (which are common):
   a. What do you think we should do?
   b. What do most people do?
   c. What would the court do?
   d. What do you think is fair?

   "Facilitative mediators believe that they are responsible for the effectiveness and integrity of the *process*, but the parties are responsible for the *substantive outcome.* A facilitative style of mediation is commonly seen in community mediation programs, where the mediators come from a variety of professional backgrounds and there are fewer lawyers serving as mediators." Hoffman, *Mediation*, pp. 1-14, 1-15.

2. Evaluative- "Evaluative styles of mediation are commonly found among mediators who are former judges and, in some instances, lawyers. An evaluative style of mediation can range from its starkest extreme, in which the mediator makes a prediction of what a court will do with the case or with a particular issue, to the more subtle end of the spectrum, in which a mediator might ask probing questions designed to provide 'reality testing' if the parties seem to be unduly optimistic about their likely outcome in court.

Evaluative mediators are also more likely than facilitative mediators to help the parties generate options and formulate proposals. *See generally* Marjorie Corman Aaron & Dwight Golann, 'Merits Barriers: Evaluation and Decision Analysis,' in *Mediating Legal Disputes: Effective Strategies for Neutrals and Advocates* (Dwight Golann ed. 2009.)." Hoffman, *Mediation* p. 1-15.

3. Combination-There are purists who espouse a particular style of mediation and use no other. However, many mediators use both styles. They use the facilitative style at the beginning of a mediation as they are learning about the case, the parties and lawyers and are trying to build trust and rapport. Thereafter, they might move to a more evaluative style to become an agent of reality or reinforce what a lawyer has been telling his client.

VII. Methods to Conduct Mediation: There are many methods to conduct a mediation and combinations of each method. The method selected depends on the mediator, parties, and advocate lawyers for the parties. The following are sample mediation methods:

1. Opening joint session with both parties and lawyers, followed by separate caucus sessions.
2. No joint sessions, totally caucus.
3. Caucus sessions, with an allowance for a joint session with the mediator and lawyers.
4. Caucus sessions, with possibility for joint session between the parties or parties and mediator or the parties, their lawyers and the mediator.
5. If neither party has a lawyer, the mediator meets with the parties sometimes jointly and separately.
6. The mediator can meet separately with one of the lawyers. The lawyer advocate might need a reality check or to be corrected on the law. Do not embarrass the lawyer in the presence of the client.

VIII. Roles of Mediator:

1. Remain neutral. Show no bias or the appearance of bias.
2. Have a ton of patience.
3. Be prepared.
4. Remain calm and carry on.
5. Be an agent of reality. Explain the financial strain, emotional strain, risks and uncertainty of going to court. Mediation day is opportunity day and the only day the parties will have control over the outcome. **I tell the parties, "Going to court is like taking your favorite pet to a partnership between a veterinarian and taxidermist. All you know for certain is that you are going to get your pet back."**
6. Ask each lawyer what their fees will be between the time of mediation and trial, if an agreement is not reached. Ask each lawyer how long it will be before a trial. Most parties want their case over and want to minimize what the pay to lawyers.
7. Determine the interests that underlie each party's positions. Usually there is an overlap of interests despite different positions.
8. **Do no harm**.

9. Ask the parties to tell you their BATNA (best alternative to a negotiated agreement); their WATNA (worst alternative to a negotiated agreement); and RATNA (realistic alternative to a negotiated agreement).
10. By asking questions, help determine the ZOPA (zone of possible agreement).
11. Build trust and rapport (more on that topic later).
12. By asking questions, help determine the barriers to reaching an agreement as well as each party's "walk away position."
13. By asking questions, help the parties explore more settlement options.

IX. What Makes a Good Mediator? Build Trust and Rapport:

1. Serious mediation training and substantive expertise are critical, as are patience and keen analytical skill. However, according to a survey by Northwestern University Law School professor Stephen Goldberg, veteran mediators believe that establishing rapport and trust is more important to effective mediation than employing specific mediation techniques and tactics. Goldberg also learned that to gain a party's trust and confidence, rapport must be genuine: "You can't fake it." Before people are willing to settle, they must feel listened to and that their interests are truly understood. Only then can a mediator reframe their interests and goals and provide creative options and solutions.
2. An effective mediator needs to obtain pre-mediation information about each party, such as their education, occupations, hobbies and interests. Does a party enjoy reading, movies, fishing, hunting, hiking, walking, running, water sports, and winter sports? Each of these activities can be touch points on which the mediator can build rapport and establish a connection with the parties. If the mediator participates in similar activities, he can briefly talk about the activity and start building trust and rapport.
3. Goldberg's research teaches us two important lessons. One is the importance of relationship building, especially in contentious situations. Some measure of trust is required before people will open up and reveal their true interests and goals. **The other lesson is that the hallmark of an artful and successful mediation is each party feels listened to and acknowledged, rather than maneuvered and manipulated.**
4. **Mediators can build rapport and trust in the following ways:**

   a. Be empathic to each party's feelings, concerns, financial and emotional stressors, fears and insecurities.

   b. Be prepared by knowing about the case, the issues and what each side wants, but more importantly, why they want what they want. What are their core concerns and interests?

   c. Engage each party. You cannot build trust and rapport, without engaging with each party to learn the party's interests, needs and goals and getting them to open up to you.

d. Use good communication skills.

e. Listen to their concerns, acknowledge and resolve.
f. Make sure they know that you care. Express appreciation.
g. Work hard and have patience.
h. Remember that bad words isolate. Good words connect. A mediator's tone of voice can change whether a word is perceived as good or bad.
i. Oliver Wendell Holmes, United States Supreme Court Justice, when explaining the difference between intentional and unintentional torts said, "Even a dog can tell the difference between being stumbled over and being kicked."
j. Be genuine.
k. Remain neutral and honest.
l. Be agent of reality.
m. Resist the urge to threaten.
n. Don't go on a power trip. Escape the cycle of action and reaction.
o. Manage emotions. Separate the people from the problem.

X. Mediator, Protect Yourself: Mediators should protect themselves from parties, especially pro se parties. Although in many jurisdictions, mediators enjoy immunity. It is better to safe than sorry. Mediators can obtain liability insurance from various mediator organizations as part of the annual membership fee. For example, the Association of Attorney-Mediators (www.attorney-mediators.org) provides Group Liability Coverage as part of its $250 annual membership fee. The existing coverage provides insurance limits of $500,000/$2,000,000, with a $500 deductible per claim.

a. Mediators should get pro se parties to sign and date a statement prior to the start of the mediation that contains at least the following: "The mediator is this case is Mike Gregory. The mediator has told me I should get my own lawyer. The mediator is not my lawyer and cannot and will not give me legal advice. The mediator is not the lawyer for the other party and will not provide legal advice to the other party. I am at a disadvantage by not having a lawyer to represent me in this case and in this mediation. The mediator is acting only as a third party neutral role and does not represent me or the other party. The actions and statements of Mike Gregory as mediator will be done strictly to help resolve the disputed litigation, and are not intended to advise, assist or protect me or the other party to the litigation."

b. Advocate lawyers have been sued by their prior clients for allegedly inducing a party to accept an inadequate settlement agreement. A lawyer has a duty to inform his/her client of the advantages and

disadvantages of a settlement agreement, compared to going to court. Attorneys owe a duty to clients to make a full and fair disclosure of every facet of a proposed settlement. Therefore, have each party initial each page of the settlement agreement, initial each change to the agreement and sign the signature page.

c. Whether you are acting as a mediator or as an advocate lawyer, add the following language to every MSA (mediated settlement agreement) that you do:

"Each party to this Mediated Settlement Agreement has been advised by each party's respective lawyer of the advantages and disadvantages of signing this Agreement. Each party has been given a full and fair disclosure of every part of this Agreement. Each party agrees and acknowledges that this Agreement is better than the alternative of going to court and taking on the financial strain, emotional strain, uncertainty and risks of a contested trial."

"Each party to this mediation affirms by signing this Agreement that each party is mentally and physically able and capable of participating this mediation and has willingly and voluntarily made informed decisions about this agreement without being influenced by medications, drugs, alcohol, stress, force, duress, threats or fatigue. Each party has read every word of this agreement, has had an opportunity to ask clarifying questions of the party's lawyer, and understands the agreement."

The above language protects the lawyers for the parties, as well as the mediator. This language makes each party think about the Agreement they are signing. Additionally, this language makes it less likely that a party will try to wiggle out of the deal.

XI. Summary: This article represents only the beginning of the study of the mediation process. I truly hope it is helpful.