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# Alternative Dispute Resolution Guidelines

These guidelines are intended to be a guide to provide information to individuals or entities interested in developing and implementing alternative dispute resolution processes.

## Use of Alternative Dispute Resolution

In 1997, the Texas Legislature declared:

> It is the policy of this state that disputes before governmental bodies be resolved as fairly and expeditiously as possible and that each governmental body support this policy by developing and using alternative dispute resolution procedures in appropriate aspects of the governmental body's operations and program.

Tex. Gov't Code § 2009.002.

The Texas Legislature continues to reinforce this policy by including statutory requirements related to alternative dispute resolution as part of legislation related to state agencies undergoing review by the Texas Sunset Advisory Commission. In general, state agencies are directed to develop and implement:

- negotiated rulemaking procedures for the adoption of agency rules under Chapter 2008, Tex. Gov't Code;
- appropriate alternative dispute resolution procedures to assist in resolving internal and external disputes under the agency's jurisdiction; and
- procedures that conform, to the extent possible, to any model guidelines issued by the State Office of Administrative Hearings for use of alternative dispute resolution by state agencies.

The State Office of Administrative Hearings is authorized by statute to issue model guidelines for the use of alternative dispute resolution by state agencies. Tex. Gov't Code § 2009.05. The Office's alternative dispute resolution processes have focused primarily on alternative dispute resolution processes related to resolving contested cases referred to the State Office of Administrative Hearings by state agencies.

The following guidelines and resources are offered to assist state agencies as they analyze their own operations and programs, determine areas in which alternative dispute resolution would enable them to better fulfill their missions, serve the public's interest, and contribute to good government. Some state agencies may find a ready-made blueprint for some of their programs in these materials. For others, a more customized process may be required.

# State Office of Administrative Hearings Alternative Dispute Resolution Processes

## Mediation

The State Office of Administrative Hearings has used alternative dispute resolution processes, primarily mediation, in contested case hearings since 1995. Although mediation is the form of alternative dispute resolution mostly frequently used at the State Office of Administrative Hearings, other variations of assisted negotiation are available: mini-trials, early case evaluation by a third-party neutral, or fact-finding by an expert.

## Binding Arbitration

Although binding arbitration is a variety of alternative dispute resolution, it is specifically excluded as an option for state agencies. Tex. Gov't Code § 2009.005(c). The Texas Legislature may authorize binding arbitration for a specific program. It provided an election for binding arbitration in nursing home enforcement actions brought by the State under Chapter 242, Texas Health and Safety Code. Under that statute, either the nursing facility or the State could elect to engage in arbitration at the State Office of Administrative Hearings rather than go through a lengthier contested case or judicial litigation process. The State Office of Administrative Hearings promulgated rules related to this arbitration process at 1 Tex. Admin. Code, ch. 163. In 2013, the Texas Legislature amended Chapter 247 of the Health and Safety Code, the Assisted Living Facility Licensing Act, by adding subchapter E, allowing binding arbitration. The State Office of Administrative Hearings adopted rules related to the assisted living facilities at 1 Tex. Admin. Code, ch. 156.

Binding arbitration shortens the decision-making process, but the ultimate decision is made by a third-party neutral. It does not give the participants the power to decide whether and how to resolve a dispute. Procedures, especially discovery, are streamlined, and appeal rights are limited to make the process more efficient than traditional forms of litigation. However, some participants complain that arbitration is too much like traditional litigation with the added disadvantages that the parties have to pay the arbitrator and the typical

arbitrator has a tremendous amount of discretion.

## Alternative Dispute Resolution Requirements for State Agencies

Texas laws provide the following requirements for alternative dispute resolution programs and should be applied by state agencies in designing and implementing alternative dispute resolution programs:

- Alternative dispute resolution procedures should provide that any resolutions reached will be by the voluntary agreement of the parties.
- Alternative dispute resolution procedures must be consistent with the Tex. Gov't Code, Ch. 2009 (Governmental Dispute Resolution Act); Ch. 154, Tex. Civil Practices and Remedies Code; and Tex. Gov't Code, Ch. 2001 (the Administrative Procedures Act).
- Alternative dispute resolution procedures are intended to supplement and not limit other dispute resolution procedures available for use by a governmental body. Tex. Gov't Code § 2009.052(a).
- Alternative dispute resolution processes may not be applied in a manner that denies a person a right granted under state or federal law or under a local charter, ordinance, or other similar provision, including a right to an administrative or judicial hearing. Tex. Gov't Code § 2009.052(b).
- Alternative dispute resolution processes established by state agencies should be administered by an employee who has received a minimum of 40 hours basic mediation training. That employee should:
    - maintain records of use while maintaining the confidentiality of participants;
    - establish a method of choosing third party neutrals who possess the minimum qualifications described in Tex. Civ. Prac. & Rem. Code § 154.052;
    - require third party neutrals to adhere to a particular standard of conduct or code of ethics;
    - provide information about available alternative dispute resolution processes to agency employees, potential users, and users of the program;
    - arrange training necessary to implement adopted alternative dispute resolution processes; and
    - establish a system to evaluate the program and the mediators.
- A governmental body may appoint a governmental officer or employee or a private individual as an impartial third party in an alternative dispute resolution procedure. Tex. Gov't Code § 2009.053.

- Impartial third parties:
    - must be qualified as required by the Tex. Civ. Prac. & Rem. Code § 154.052;
    - are subject to the standards and duties described in the Tex. Civ. Prac. & Rem. Code § 154.053;
    - have the qualified immunity described in the Tex. Civ. Prac. & Rem. Code § 154.055;
    - must maintain confidentiality as described in the Tex. Civ. Prac. & Rem. Code § 154.073 and Tex. Gov't Code § 2009.054,
    - may not be required to testify in proceedings relating to or arising out of the matter in dispute. Tex. Gov't Code § 2009.054(d).

- The parties have the right to object to the person appointed to serve as the third party neutral. The participants must trust the neutrality and impartiality of this person to enable the process to succeed. Tex. Gov't Code § 2009.053.
- Agencies may require participation in mediation but may not require that the participants reach an agreement.
- Oral and written communications between the parties, and between the parties and the mediator, related to the alternative dispute resolution process are confidential and may not be disclosed unless all the parties consent to the disclosure. Tex. Gov't Code § 2009.054, Tex. Civ. Prac. & Rem. Code §§ 154.053, 154.073.
- A final written agreement to which a governmental body is a signatory is subject to required disclosure, is excepted from disclosure, or is confidential as provided by the Tex. Civ. Prac. & Rem. Code § 154.073 and other laws, including the Texas Public Information Act, Tex. Gov't Code, ch. 552. Tex. Gov't Code § 2009.054(b).
- An impartial third party may not be required to testify in any proceeding relating to or arising out of the matter in dispute. Tex. Gov't Code § 2009.054(d).

## Mediation at the State Office of Administrative Hearings

Mediation is an informal process used to resolve disputes by negotiation and settlement. Mediation is a popular form of alternative dispute resolution used to resolve disputes informally. In mediation, a third-party neutral, the mediator, facilitates communication between the parties to a controversy and assists them in their efforts to reach a mutually acceptable resolution of the dispute. The mediator is not a decision-maker; the parties themselves control the outcome.

The mediator is independent and neutral, and has no interest in the outcome of any contested matter. The mediator's role is to be impartial and to determine, through talking to the affected participants, what their true concerns are, and to guide them to a resolution of the dispute that addresses their concerns. It is not the mediator's role to discourage protests, to pressure parties into settling, or to talk participants out of a trial or hearing. The mediator does not create the solution to the dispute – that is the responsibility of the parties during negotiations. The mediator assists by facilitating dialogue and conveying messages between the participants, and offering the encouragement and tools the parties need to craft their own settlement.

Communications in mediation are confidential. alternative dispute resolution statutes require that all communications made during mediation are to be kept confidential. The mediator cannot be compelled to testify about anything that occurred during the mediation. The mediator also is prohibited by law from disclosing any information or statements given to him or her by any mediation participant. If partial agreements are reached, such as a list of stipulated facts, they will be reported to the presiding State Office of Administrative Hearings administrative law judge in writing, as approved by the parties, and filed in the case. Also, information shared in mediation that is otherwise subject to discovery does not become confidential simply because it is shared in mediation.

## Requesting Mediation

Parties involved in a contested case matter before the State Office of Administrative Hearings may request mediation or a State Office of Administrative Hearings administrative law judge presiding over the contested case hearing may recommend mediation. Because mediation is voluntary and requires negotiations, all parties must first agree to participate in mediation. No party is forced or ordered to participate in mediation. If mediation proceeds, all participants or their representatives must attend with the proper authorization to negotiate a binding agreement. SOAH's rules prescribe the procedures ALJs and parties must follow in requesting and referring disputes to mediation. 1 Tex. Admin. Code § 155.351.

In certain circumstances, it may be better to refer the case for mediation evaluation to determine if the case is appropriate for mediation at the juncture. A State Office of Administrative Hearings mediator will confer separately with the parties and issue a mediation evaluation report indicating whether the mediator believes the case should proceed to mediation.

## Mediation Process

Once all parties agree to mediation, a State Office of Administrative Hearings mediator will begin discussing the case with the parties, to become familiar with the parties' interests and the reasons for the dispute. Sometimes these initial discussions will end in a request by one party to make an offer of settlement. The mediator can assist in crafting such an offer, communicating it to the other side, and assisting with post-offer discussions such as questions or counter-offers. Disputing parties are often better able to negotiate and settle their disputes, however, if they can discuss matters face to face. Because of this, mediators prefer to schedule a formal meeting in which all parties, including those agency representatives assigned to the matter, meet at a neutral, agreed-upon location, on a date that works for all.

Though each mediation is unique and requires a tailored approach, a typical mediation meeting proceeds through the following steps:

1. **Introductory statements from the mediator.** The mediator explains the process, laying the ground rules for the discussions and answering questions.
2. **Opening statements from the parties.** This is the parties' opportunity to fully lay the issues on the table, and establish the foundation for what needs to be discussed. Each party is given uninterrupted time to say whatever they wish, but are encouraged to be as thorough and as specific as possible up front.
3. **Question and answer period.** This is an opportunity for the parties to ask any questions they have which may be helpful to leading the parties in the direction of settlement. Parties are reminded that these discussions are confidential, so they should feel comfortable being open and candid, knowing their statements could not be used against them at a later time.
4. **Identify issues.** Identification and enumeration of the specific issues that the parties seek to address as part of a settlement agreement. The mediator will clarify issues, help parties assess their options, and assist parties analyze the strengths and weaknesses of their cases.
5. **Solution brainstorming.** Parties are asked during this phase for any ideas they have that could address the identified issues. Creativity and open, collaborative group discussion are encouraged, and parties should not be shy about suggesting ideas that may seem unrealistic. Often even unrealistic and unworkable proposals can lead the parties toward one that may be feasible.
6. **Settlement ideas.** Narrowing talking points to the settlement ideas the parties believe are worth pursuing. The parties may wish to caucus (privately meet in a separate room among themselves) to make these evaluations.
7. **Offer.** The presenting of an offer by one party to the other.

8. **Negotiation, if necessary.** This is often performed in caucus, with assistance from the mediator.
9. **Settlement.** If the parties reach an agreement, it is usually reduced to writing as a settlement agreement and signed by the individuals present before the end of the mediation.

## Advantages of Mediation

Contested case hearings can be complex, costly, and time consuming. If the matter is settled in mediation, then a hearing is not needed and all parties save the expense, time, and stress of a hearing. Also, because there are no jurisdictional limits on the issues discussed at mediation, the parties are free to focus on and craft an agreement that addresses the issues that matter most to them. Because disputes resolved through mediation rely upon collaborative negotiation and creative problem solving, mediation can result in a "win-win" outcome.

If parties participate in mediation but are unable to reach a settlement, the parties retain their same legal positions they had before the mediation, as if the mediation had never occurred. The matter may then be tried before a State Office of Administrative Hearings administrative law judge in a contested case hearing.

## Appropriate for Mediation

The following list of factors may be helpful in considering whether a case is appropriate for mediation:

- **Is the issue appropriate for mediation?**
    - What evidence will each party need to prove its case?
    - Is the case heavily fact-based? Are the facts objectively knowable?
    - How heavily does the case depend on the credibility of witnesses?
    - Is the controlling law clear?
    - Is an agency litigating the case for a policy reason?
    - Is either party looking for a precedent?
    - Is a party looking for something that cannot be obtained by an order from an administrative law judge or the agency but that may be achievable by agreement?
    - How wide is the range of possible resolutions of the dispute? For example, in an enforcement case, if there was violation, does the agency have discretion to impose a range of sanctions?
    - Are there options that may meet all interests but that the administrative law judge cannot order?

- Do the parties have an ongoing relationship? Will resolution of the dispute likely require voluntary cooperation between the parties? Will use of mediation have a favorable effect on the parties' future relationship?
- Is the potential result of litigation sufficient to justify the resources litigation will require?
- If a complete settlement is not likely, would mediation nonetheless be helpful? For example, can mediation narrow the issues? Streamline discovery?
- How much time and resources will mediation take? A contested case hearing?
- Are there reasons, other than economic considerations, why the agency might wish to consider mediation?

- **Are the parties ready to mediate?**

  - How knowledgeable are the parties about the issues in dispute?
  - Does each party understand how the other party perceives the facts?
  - Do any legal issues need to be decided before the parties can meaningfully evaluate the merits of their respective cases?
  - Have the parties engaged in settlement discussions?
  - Have the parties considered the consequences of losing the case?
  - Do the parties have communication problems?
  - Do the persons who would represent the parties in the mediation have sufficient authority to enter into a settlement agreement?
  - Has necessary discovery been completed? Or can it be avoided?
  - Are there deadlines coming up that could be avoided by settlement?
  - Can all necessary parties be brought to the negotiating table?
  - Are there interested persons or stakeholders who might play a role in mediation but who would not have standing to participate in a contested case?

# Glossary of Terms

**Administrative Procedure Act (APA):** Tex. Gov't Code, ch. 2001. The APA sets out minimum standards of uniform practice and procedure for state agencies and provides that contested cases may be resolved by an agreed settlement or consent order. Alternative dispute resolution is one way to reach such a resolution. Tex. Gov't Code § 2001.056.

**Alternative Dispute Resolution:** A wide variety of somewhat informal processes intended to achieve conflict resolution by agreement of the parties to the conflict. The goal is to develop an agreed resolution that meets the most important needs of each participant. Alternative dispute resolution may include but is not limited to: mediation, facilitation, negotiated rulemaking, collaborative problem-solving, consensus building, and non-binding arbitration.

**Arbitration:** A form of alternative dispute resolution, governed by an agreement between the parties or special rules or statutes providing for the process, in which a third-party neutral issues a decision after a simplified hearing. Arbitrations may be binding or non-binding.

**Conciliation:** A facilitative process much like mediation, but with less structure. If successful, it usually mends the relationship and brings about a reconciliation of the parties.

**Consensus building:** A facilitative process much like mediation, but involving a larger group with a number of issues.

**Hybrid processes:** A combination of two or more alternative dispute resolution processes.

**Negotiated Rulemaking:** A consensus-based process in which an agency develops a proposed rule by using a neutral facilitator and a balanced negotiating committee composed of representatives of all interests that the rule will affect, including those interests represented by the rulemaking agency itself. Tex. Gov't Code, ch. 2008.

**Mediation:** A confidential, informal dispute resolution process in which an impartial person, the mediator, facilitates communication between or among the parties to promote reconciliation, settlement, or understanding among them.

**Third party neutral; impartial third party**: An individual trained to conduct alternative dispute resolution processes who has no personal interest or stake

in the outcome of the dispute.