



Guide to Mediation at the State Office of Administrative Hearings

What to Expect

Mediation starts with a joint meeting. At this meeting, the mediator will explain the process, each individual will be given an opportunity to make a short statement, and clarifying questions may be asked.

Next, the mediator will meet with each side separately. These separate meetings are referred to as "caucuses." In a caucus, any confidential information provided to the mediator will remain confidential unless the mediator is specifically authorized to relay it to the other side. However, please note that it is often helpful to identify and share the reason certain requests are made and why they are believed to be appropriate. Caucuses may continue with the mediator carrying offers and counteroffers between the two sides. There may also be one or more additional joint meetings.

When an agreement is made, it is reduced to writing and signed by the individuals present prior to ending the mediation. Since all mediations at the State Office of Administrative Hearings involve a state agency, any written agreement may be subject to the Texas Public Information Act.

Take Advantage

A mediation scheduled with the State Office of Administrative Hearings may be the best, and perhaps last, opportunity for the parties to resolve the dispute themselves.

Once a dispute is submitted to a higher authority for resolution (e.g. an administrative law judge in a general hearing) the parties no longer control the outcome. When this occurs, typically neither side is wholly satisfied with the resolution imposed by the higher authority. In addition, the resources required to prepare and present a general hearings case and pursue it through available appeals can be considerable.

It is for these reasons, parties to mediations at the State Office of Administrative Hearings are encouraged to actively and fully participate in this opportunity to reach agreement.

Is a Lawyer Required for Mediation?

Parties to a mediation at the State Office of Administrative Hearings are not required to have an attorney represent them and may represent themselves. Please note that in most cases, the state agency that is party the mediation at the State Office of Administrative Hearings will be represented by a state-employed attorney.

In addition, while the State Office of Administrative Hearings mediator will explain the process and facilitate a constructive meeting, they are neutral and impartial. The mediator will not represent, advise, or make recommendations to any party during a mediation. Each party is responsible for their own decisions, whether represented by an attorney or not.

Mediations are Confidential

Communications in mediation are confidential. This includes any offers and counteroffers made by the participants. The mediator will not communicate about the mediation with any decision-maker who handles this case, other than to report in writing that a mediation took place and whether it was successful.

A mediator cannot be compelled to testify about anything that occurred during the mediation. If partial agreements are reached, such as a list of stipulated facts, they will be reported to the presiding administrative law judge in writing, as approved by the parties, and filed in the case.

Comments made by the mediator during the process are also confidential. However, information shared in mediation that is otherwise subject to discovery does not become confidential simply because it is shared in mediation.

The Parties are in Control

The power to settle a dispute through mediation lies entirely with the participants. The mediator cannot issue orders or force the parties to reach an agreement.

The mediator's role is to be neutral, to guide the process, and to facilitate communications. The parties' role is to work, in good faith, to resolve their dispute in a way that satisfies their most important needs.

If the parties' most important needs cannot be met through a mediated agreement, the parties still have the opportunity for a general hearing.

Mediation Bargaining

In mediation, the mediator helps the parties focus on the interests that lie behind their respective positions. Why do they take a certain position? What concerns, public policies, and private needs cause them to take that position? If these interests can be openly identified, parties are more likely to craft creative solutions that satisfy everyone's interests.

For example, an agency prosecuting a disciplinary case against a professional licensee is usually concerned with protecting the public and deterring future bad acts. The licensee is usually interested in protecting his or her professional reputation and ability to earn a living. Through mediation, the parties often can agree to a solution that fulfills all of these interests.

Know the Case

Mediations are successful when parties understand the issues and can realistically assess their options. What evidence do each of the parties have to prove their case? Is it objective? If a case turns on the credibility of witnesses, it is usually harder to predict the outcome. If a case has documentary evidence, case law, or other authority that supports a party's position, that party should bring copies to the mediation.

Each party should analyze the other side's case and know the strong and weak points. Keep in mind, however, that the goal of mediation is not to convince the other side that you are "right," but rather, to try to reach an agreement that protects each parties' most important needs.

Think "Outside the Box"

Parties to a mediation should be creative. Each party should determine what really needs to be accomplished to resolve the dispute. They should carefully consider the interests of the various parties and try to formulate multiple options that will meet those needs.

In disciplinary cases against professional licensees, for example, many agencies originally had only one enforcement tool, revocation of the license to practice. Now those agencies generally have flexibility as to the kinds of sanctions they may impose.

All parties must be careful, however, not to expect the mediation to resolve all issues in the relationship. The focus must stay on the State Office of Administrative Hearings case.

Parties to a mediation should also be realistic. Successful mediation involves compromise. Neither party is likely to get everything they want in a mediation. It is important to focus on what is really needed.

Bring Authority to Settle

Mediations at the State Office of Administrative Hearings generally involve only the persons directly involved in the dispute and their lead counsel. Parties should only bring to the mediation those people who have a need to participate (i.e. people directly involved in the dispute). However, those people must have full settlement authority.

If absolutely necessary, parties may confer with others by telephone; however, there are distinct disadvantages to mediating in these circumstances. Problems may arise because persons outside the mediation have not experienced the dynamics of the conversations in the room. Without the benefit of that experience, they may overestimate the strength of their case and underestimate the merits of the other party's circumstances. At worst, such a turn of events may lead to an impasse in the mediation after the participants have spent many hours working to forge an agreement acceptable to everyone in the room.

It is important to inform the mediators who will be attending the mediation as soon as possible so that the mediators may consider what is appropriate participation for each party.

Mediation Styles

Mediation at the State Office of Administrative Hearings is generally a collaborative process. We facilitate communication and clarify issues, help parties assess their options, and memorialize any agreements the parties reach.

However, in caucuses, mediators sometimes help parties analyze the strengths and weaknesses of their cases. If the mediator evaluates some aspect of your case, remember that any opinion expressed by the mediator is just that—one person's opinion. That opinion is based on limited information, such as summaries of anticipated evidence. Discovery may not have been completed yet. The mediator has not had the opportunity to

assess witness credibility, nor has the mediator done independent legal research.

In spite of these limitations, the view of a mediator (who in other circumstances hears cases as an administrative law judge) often gives parties a useful glimpse of how their case may be perceived by a neutral third party. Any views expressed by a mediator under these circumstances are confidential, do not constitute legal advice, and are not predictions as to how the presiding administrative law judge will view the issues.

Giving such an evaluation is discretionary with the mediator, unless prior to the mediation the parties have requested, and the mediator has agreed, to provide such an evaluation.

Communicating with the Mediator before the Mediation

A mediator, unlike judge in a general hearings case or a lawsuit, is not subject to ex parte prohibitions and may communicate with each participant individually. It is up to each party whether they share their pre-mediation submission with opposing counsel. Each party should identify any information that will be shared with the other party.

Please include the following on any materials submitted to the mediator prior to the mediation:

1. A short description of the dispute
2. Any information or documents the party is requesting the mediator review before the mediation
3. A list of persons who will attend the mediation and their relationship to the dispute
4. A summary of any settlement offers made or rejected
5. A description of what the party needs to be able to resolve the dispute
6. A description of what the party thinks the other side needs to be able to resolve the dispute.

All mediation materials submitted to the State Office of Administrative Hearings should be clearly marked as "CONFIDENTIAL MEDIATION INFORMATION." Pre-mediation statements and all other mediation materials may be sent by United States Postal Mail, hand-delivery, or fax to the State Office of Administrative Hearings Austin office:

State Office of Administrative Hearings

Mail: CONFIDENTIAL MEDIATION INFORMATION
State Office of Administrative Hearings
P.O. Box 13025
Austin, Texas 78711-3025

Hand-Delivery: CONFIDENTIAL MEDIATION INFORMATION
State Office of Administrative Hearings
300 W. 15th Street
Suite 504
Austin, Texas 78701

Fax: 512.475.4994