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Texas-Style Mediation in 2019: Seven Ways to Make Mediation Work

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Mediation in Texas began to flourish in June 1987 with the passage of Chapter 154 of Title 7 of the Texas Civil Practice and Remedies Code, Alternative Dispute Resolution Procedures (Texas ADR statute). It changed the face of Texas jurisprudence and is now thoroughly integrated into the justice system. Mediation helps avoid the creation of more expensive courts and serves an expanding population's need for efficient justice. It is believed that mediation leads to resolution approximately 80 percent of the time. It is said that you can't take a case to trial without mediating at least once; less than 4 percent of civil disputes go to trial in Texas state courts. Here are seven characteristics that make mediation work for the parties and the judicial system.

1. **Training:** Initially, Texas mediators were sua sponte appointed by state courts pursuant to the Texas ADR statute (Section 154.052). The court sought mediators with "40 classroom hours of training in dispute resolution techniques in a course conducted by an alternative dispute resolution system" or "other professional training or experience

in particular dispute resolution processes," plus, for family cases, "an additional 24 hours of training in the fields of family dynamics, child development, and family law."

In 1989, the Dallas Bar Association trained mediators to meet the need in Dallas and Houston. Today, many Texas universities and law schools have dispute resolution and negotiation courses that meet this need by training younger lawyers as mediators and advocates. Among the institutions that have dispute resolution departments and/or programs are the following:

- Abilene Christian University, Duncum Center Solutions
- Southern Methodist University, Dispute Resolution & Conflict Management Program
- University of Houston Law Center, A.A. White Dispute Resolution Center

The Supreme Court of Texas has recognized the need for oversight of the quality of mediation in Texas by advancing some ethical guidelines. Although mediation is not regulated in Texas, Texas mediators may receive credentialing from the Texas Mediator Credentialing Association (TMCA).



Key Takeaway: Use a mediator who fits the process to the parties.

2. **Organizations:** Texas is fortunate to have many organizations focused on mediation. The largest alternative dispute resolution (ADR) group is the Alternative Dispute Resolution Section of the State Bar of Texas. Texas Association of Mediators includes both attorneys and other professionals. The Association of Attorney-Mediators was founded in Dallas. The TMCA has approximately 350 credentialed mediators. These organizations ensure the future of mediation. They support mediators professionally, socially and emotionally,

and provide newsletters, trainings and programs throughout the year.

Key Takeaway: Use a mediator who is a member of one or more of these organizations.

3. **Specialization:** Over the last 32 years, mediators have developed strengths in personal injury, family, business commercial, probate/estates, labor and employment, health and construction/real estate matters. Personal injury cases are often mediated in two-hour or half-day sessions. Family law cases are usually multiple-day mediations. Most other areas of law can require at least a full-day mediation.

Key Takeaway: Use a mediator who has vast experience in the area of law at issue and can thus ask the right questions to assess risk and to facilitate resolution.

4. **Confidentiality:** The Texas ADR statute provides that a mediator shall not reveal information made available in the mediation process and that such information is privileged. A mediator may not be required to testify regarding any disclosure of information in mediation or be questioned about the conduct of the parties during mediation (Sections 154.053 and 154.073). A mediator can report to a court only whether or not the matter settled. There is confidentiality within the individual caucus sessions. A mediator must determine and confirm what he or she can and cannot reveal to the opposing party. The Texas Supreme Court's ethical guidelines require confidentiality. The four federal districts in Texas each have ADR plans that ensure confidentiality. Parties in Texas are accorded the secrecy of their family disputes and business

relationships. Confidentiality is presumed in Texas mediations.

Key Takeaway: Use a mediator who understands the importance of confidentiality.

5. **Joint Sessions:** The joint session is still used in most Texas mediations. The joint session is when the parties meet, greet and sometimes make opening statements. There are joint sessions where day-in-the-life videos, PowerPoint presentations and deposition summaries are viewed to enhance the information for consideration of settlement. The joint session is the only time the parties and attorneys can confidentially speak directly to each other and present an uninterrupted (and often cathartic) explanation of their positions. The more personal the matter, the more important the joint session is to reaching a settlement.

Key Takeaway: Use a mediator who uses joint sessions to explore creative solutions.

6. **Preparation:** A mediator prepares by reading the pleadings and confidential mediation statements. An attorney's preparation of the client is fundamental to the success of the mediation. The client should be ready for a long day of negotiation. When a mediation fails to reach settlement, it is most often because one or more of the parties experiences an emotional reaction. Help your client work through his or her emotions before the mediation and determine how to keep them under control and out of the risk analysis negotiation process.

Key Takeaway: Everyone must be adequately prepared for a mediation.

7. **Snacks:** Food is a very important aspect of mediation. Lunch is often provided during a full-day mediation. In Dallas, snacks, including popcorn, cookies and homemade brownies, may be served around 2:00 p.m. to enhance the parties' energy level for what could be a long afternoon ahead. In Houston, there is an ongoing battle of cheesecakes. In Central Texas, Blue Bell Fudge Bars are the snack of choice. Keeping the parties hydrated, fed and in good spirits is essential to the negotiation process.

Key Takeaway: Make sure to have plenty of snacks on hand, especially for full-day mediations. Keeping people happy, not "hungry" should be a priority.

Cecilia H. Morgan, Esq has conducted more than 2,500 sessions of civil cases and arbitrated more than 1,000 cases throughout Texas and 31 other states. She has over 40 years of experience as an attorney and ADR professional and is a respected member of the JAMS employment, energy, health care, and financial services practice groups.

