



Confidentiality & Mediation

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The Statute

TCPRC 154.053 "Standards and Duties of Impartial Third Parties"

(b) Unless expressly authorized by the disclosing party, the impartial third party may not disclose to either party information given in confidence by the other and shall at all times maintain confidentiality with respect to communications relating to the subject matter of the dispute.

The Statute

(c) Unless the parties agree otherwise, all matters, including the conduct and demeanor of the parties and their counsel during the settlement process, are confidential and may never be disclosed to anyone, including the appointing court.

The Statute

Sec. 154.073. CONFIDENTIALITY OF CERTAIN RECORDS AND COMMUNICATIONS

Communications are confidential.

Relate to the subject matter of any civil or criminal dispute made by a participant in an alternative dispute resolution procedure

Before or after the institution of formal judicial proceedings

"confidential", is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding."

The Statute

Sec. 154.073. CONFIDENTIALITY OF CERTAIN RECORDS AND COMMUNICATIONS

Records

Any record made at an alternative dispute resolution procedure is confidential.

Participants or the third party facilitating the procedure may not be required to testify in any proceedings relating to or arising out of the matter in dispute or be subject to process requiring disclosure of confidential information or data relating to or arising out of the matter in dispute.

The Statute

- But,

An oral communication or written material used in or made a part of an alternative dispute resolution procedure is admissible or discoverable if it is admissible or discoverable independent of the procedure.

The Statute

- But,
- (d) [An exception for governments who are parties to a MSA and Open Records].
- (e) If this section conflicts with other legal requirements for disclosure of communications, records, or materials, the issue of confidentiality may be presented to the court having jurisdiction of the proceedings to determine, in camera, whether the facts, circumstances, and context of the communications or materials sought to be disclosed warrant a protective order of the court or whether the communications or materials are subject to disclosure.

But...

(d) Each participant, including the impartial third party, to an alternative dispute resolution procedure is subject to the requirements of Subchapter B, Chapter 261, Family Code, and Subchapter C, Chapter 48, Human Resources Code.

Family Code: A professional who has "cause to believe that a child's physical or mental health or welfare has been adversely affected by abuse or neglect" shall make a report within 48 hours.

Human Resources Code: "a person having cause to believe that an elderly or disabled person is in the state of abuse, neglect, or exploitation, including a disabled person receiving services, shall report the information to" the Department of Protective and Regulatory Services.

2005



**Ethical Guidelines for Mediators
(Tex. S.Ct.)**

- “A mediator should protect the integrity and confidentiality of the mediation of the process...[commencing] with the first communication to the mediator, is continuous in nature, and does not terminate upon the conclusion of the mediation.”

**Ethical Guidelines for Mediators
(Tex. S.Ct.)**

- A mediator should inform and discuss with the participants that:
 - the mediation is private;
 - it is confidential “to the extent provided by law.”

**Ethical Guidelines for Mediators
(Tex. S.Ct.)**

- 8. Confidentiality
 - Mediator not to reveal information that is privileged and confidential unless affected parties agree or as may be required by law.

Ethical Guidelines for Mediators
(Tex. S.Ct.)

- Cmt (a) A mediator:
 - should not permit recordings/transcripts to be made of mediation proceedings;
 - should maintain confidentiality in storage/disposal of records and render anonymous all identifying information when materials are used for research, educational, or other informational purposes;

Ethical Guidelines for Mediators
(Tex. S.Ct.)

- should not disclose to other parties information given in confidence by disclosing party and should maintain confidentiality with respect to communications relating to the subject matter of the dispute.
- should report to court whether mediation occurred, and resulted in settlement, impasse, recess, or rescheduled.
- should advise parties that disclosure is required and will be made when required by law.

2005



ABA, ACR, AAA
Model Standards

- A mediator **shall** maintain the confidentiality of all information obtained by the applicable law.
 - If the parties to a mediation agree that the mediator **may** disclose information obtained during the mediation, the mediator may do so.
 - A mediator **should not** communicate to any non-participant information about how the parties acted in the mediation. A mediator may report, if required, whether parties appeared at a scheduled mediation and whether or not the parties reached a resolution.

ABA, ACR, AAA
Model Standards

- If a mediator participates in teaching, research or evaluation of mediation, the mediator **should** protect the anonymity of the parties and abide by their reasonable expectations regarding confidentiality.

ABA, ACR, AAA
Model Standards

- A mediator who meets with any persons in private session during a mediation **shall not** convey directly or indirectly to any other person, any information that was obtained during that private session without the consent of the disclosing person.

ABA, ACR, AAA
Model Standards

- A mediator shall promote understanding among the parties of the extent to which the parties will maintain confidentiality of information they obtain in a mediation.

ABA, ACR, AAA
Model Standards

- Depending on the circumstance of a mediation, the parties may have varying expectations regarding confidentiality that a mediator should address. The parties may make their own rules with respect to confidentiality, or the accepted practice of an individual mediator or institution may dictate a particular set of expectations.



TMCA Grievance Rules

- Confidentiality of Mediation.
- Any of the following may not be disclosed to anyone, unless agreed to by the affected persons who participated in the mediation, or as required by law.

TMCA Grievance Rules

- Any communication relating to the subject matter of a civil/crim dispute made by a participant in mediation, whether before or after institution of formal judicial proceedings.

TMCA Grievance Rules

- Any record or writing made at a mediation.

TMCA Grievance Rules

- All other matters occurring during mediation, including the conduct and demeanor in a mediation of an affected person or their counsel who participated in a mediation.

TMCA Grievance Rules

- All matters that the affected persons who participated in a mediation agree will not be disclosed.

Why do we favor mediation confidentiality?

Why?

- Why do mediators want confidentiality?
- Why do parties want confidentiality?
- Why does public policy want confidentiality?

Considerations

- Exclusionary Rules
 - FRE 408/TRE 408
 - Relevance
 - Policy favoring settlement

Considerations

- Trust
 - Between participants and the mediator
 - Policy favoring settlement

Considerations

- Mediator neutrality
 - Mediator testimony may mean no longer neutral
- Mediator finality

Considerations (against confidentiality)

- Abuse of the process
 - Delay
 - Refuse to negotiate
 - Misrepresentation of facts

Considerations (against confidentiality)

- Mediator abuse
- Open meetings/public records
- Child/elder harm
- Mediator seeking advice
- Mediator training/feedback



“Tire Recall Fuels Drive to Bar Secret Settlements”
Sept. 10, 2000

- Firestone/Bridgestone
 - 6.5 million tires recalled
 - Confidentiality provisions
- Zomax (painkiller)
 - Dozen deaths
- Should there be confidentiality when public safety is threatened?
Confidentiality costs lives?
- Confidential settlements are signed by both sides--if there is something that threatens health and safety, a party doesn't have to agree to confidentiality.

- How does settlement amount improve public safety?
- How does no admission of liability clause improve public safety?
- Companies report to Consumer Product Safety Comm'n if sued or settled 3 times in two years.

What does “confidential” mean?

- Totally secret?
- Generally protected from disclosure?
- Protection from subsequent disclosures in court? In public? Anywhere and anytime?

Doe v Francis

- Allegations
 - Ct Ordered Mediation
 - “all statements confidential”
- Issues
 - 4 hours late
 - inappropriate clothing
 - aggressive
- Mtn Sanctions



Doe v Francis

- “Bury”/ “Ruin” not violence, but frustration (Fla Stat no med confid to commit/attempt crime, threaten violence)
- 13 subsequent hrs



Doe v Francis

- Conduct violated ct mediation order
- Jailed until properly participate, certified by mediator



Hypo

- Ct orders parties to mediation in “good faith” with representative with full authority present. Ct conducts hearing, with questions about authority, knowledge of the case, mediation preparation, and phone communications.

Hypo

- Was court authorized to conduct this hearing and ask these questions?
- In re Acceptance Ins. Co., 33 SW3d 443 (Tex. App.--Fort Worth 2000)

Hypo

- “I intend to use mediation to drive up the costs for the other side.”
- Bethlehem School Dist. v. Zhou, E.D. Pa. July 23, 2010

Hypo

- Atty gives advice to client during mediation. Client settles.
- Client later sues atty, claiming atty induced client to a lower settlement than should have received.
- Cassell v. Superior Ct., No. S178914 (Cal. Jan. 13, 2011)

Hypo

- At mediation, participant admits to theft. Later prosecuted, State uses that statement as proof.
- Williams v. State, 770 S.W.2d 948 (Tex. App.-Houston [1st Dist.] 1989, no writ hist.)

Hypo

- At mediation, there was evidence of potential criminal conduct. Can that evidence be presented to a grand jury?
- In re: Grand Jury Proceedings; U.S. v. Moczygemba, 143 F.3d 487 (5th Cir. 1998)

Hypo

- Party claims that his signature on MSA was by threat made at mediation. Can he successfully claim “no contract” because of duress?
- Rabe v. Dillard’s, Inc., 214 S.W.3d 767 (Tex. App.--Dallas 2007, no pet.).

Hypo

- Party claimed it signed MSA under duress, when FDIC threatened criminal prosecution if the civil matter wasn’t settled.
- FDIC v. White, 76 F. Supp.2d 736 (N.D. Tex. 2000)

Hypo

- Parties claimed mediator bullied them into signing the MSA.
- Allen v. Leal, 27 F.Supp. 2d 945 (S.D. Tex. 1998)

Hypo

- Party refused to attend a mediation. Can the court sanction the party?
- Hansen v. Sullivan, 886 S.W.2d 467 (Tex. App.--Houston [1st Dist.] 1994, no writ hist.)

Hypo

- Party attended mediation, but left early.
- In re Daley, 29 S.W.3d 915 (Tex. App.--Beaumont 2000, orig. proceeding).

What to do?

- Review statute and case law regularly.
- Look at your confidentiality language in your Agreement to Mediate and in your oral communications to participants.
 - What’s covered? What’s not?
- Protect yourself.
 - Who pays if you are called to testify?
 - Cannot be subpoenaed (person or docs).
- Use protective language in your communications (“This Communication is for Mediation Purposes Only”).

Thank You!
