



The Supreme Court of Texas

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March 29, 2021

Mr. Charles L. "Chip" Babcock
Chair, Supreme Court Advisory Committee
Jackson Walker L.L.P.
cbabcock@jw.com

Re: Referral of Rules Issues

Dear Chip:

The Supreme Court requests the Advisory Committee to study and make recommendations on the following matters.

Ethical Guidelines for Mediators. In the attached letter, the State Bar of Texas's Alternative Dispute Resolution Section asks the Court to add a comment to Guideline 14 of the Court's Ethical Guidelines for Mediators. The Committee should review and make recommendations.

Jury Rules. The rules in Part II, Section 10 of the Texas Rules of Civil Procedure are outdated and do not reflect current practice. The Court asks the Committee to draft amendments for the Court's consideration. The Committee should consult with the Remote Proceedings Task Force on removing any barriers to remote jury proceedings.

As always, the Court is grateful for the Committee's counsel and your leadership.

Sincerely,

A handwritten signature in black ink, appearing to read "Nathan L. Hecht".

Nathan L. Hecht
Chief Justice

Attachments

October 22, 2020

Via email: jaclyn.daumerie@txcourts.gov

Hon. Nathan L. Hecht

Hon. Eva Guzman

Hon. Debra Lehrmann

Hon. Jeffrey S. Boyd

Hon. John Phillip Devine

Hon. Jimmy Blacklock

Hon. Brett Busby

Hon. Jane Bland

Hon. Rebeca Huddle

Re: Request for Approval of Amendment to the Ethical Guidelines for Mediators by the Alternative Dispute Resolution Section of the State Bar of Texas

To the Honorable Justices of the Supreme Court of Texas:

I am writing to you in my capacity as Chair of the Alternative Dispute Resolution Section of the State Bar of Texas (the Section). The purpose of this letter is to ask the Supreme Court of Texas (the Court) to approve an amendment to Guideline 14 of the Ethical Guidelines for Mediators (the Guidelines). Guideline 14 provides as follows:

14. Agreements in Writing. A mediator should encourage the parties to reduce all settlement agreements to writing.

The following comment is the amendment to Guideline 14:

Comment. A mediator may prepare a written settlement agreement that memorializes the terms agreed to by the parties, and may suggest additional terms in a draft that are consistent with terms agreed to by the parties.

The basis of this Comment is Ethics Opinion 675 of the Professional Ethics Committee of the State Bar of Texas (the PEC), issued in August 2018. Ethics Opinion 675 answered some issues that have concerned Texas mediators for years. The Comment incorporates the key language from the PEC's opinion. This letter contains contextual information and the Section's reasons for proposing the Comment.

The Confusion Created by PEC Ethics Opinion 583 in 2008

In September 2008, the PEC issued [Ethics Opinion 583](#) in answer to the following question it received from a Texas attorney: "May a lawyer enter into an arrangement to mediate a divorce settlement between parties who are not represented by legal counsel and prepare the divorce decree and other necessary documents to effectuate an agreed divorce if the mediation results in

an agreement?” For the reasons stated in its opinion, the PEC concluded, “[A] lawyer may not agree to serve both as a mediator between parties in a divorce and as a lawyer to prepare the divorce decree and other necessary documents to effectuate an agreement resulting from the mediation. Because a divorce is a litigation proceeding, a lawyer is not permitted to represent both parties in preparing documents to effectuate the terms of an agreed divorce.”

Some attorneys acting as mediators interpreted the language of Ethics Opinion 583 expansively. They interpreted the opinion’s conclusion, which prohibited not only the mediator’s preparation of a divorce decree but also the “other necessary documents to effectuate an agreement resulting from the mediation” as a declaration that mediators should not draft a Mediated Settlement Agreement (MSA) at the conclusion of any mediation in which the parties reach an agreement.

Other attorneys acting as mediators interpreted Ethics Opinion 583 less expansively. They observed that MSAs were not within the scope of the question Ethics Opinion 583 answered. They also reasoned that assisting parties in drafting an MSA is a logical—and often expected or necessary—component of the service mediators provide to parties. They believed an expansive interpretation of Ethics Opinion 583 would impede mediators from providing a service many parties consider imperative.

In March 2016, after almost eight years of uncertainty regarding the interpretation of Ethics Opinion 583, an attorney and mediator asked the PEC to clarify the meaning of the contested language. In response, the PEC issued [Ethics Opinion 675](#) in August 2018.

PEC Ethics Opinion 675 Addressed the Controversy in 2018

Ethics Opinion 675 considered the following questions: “May a Texas lawyer, acting as a mediator, prepare and provide to the parties in the mediation a proposed written agreement that memorializes the terms of the parties’ agreement reached during the mediation? If so, may the lawyer-mediator propose terms for inclusion in the written agreement in addition to the specific terms agreed to by the parties in the mediation?”

For the reasons stated in its opinion, the PEC concluded: “A Texas lawyer, acting as a mediator, does not violate the Texas Disciplinary Rules of Professional Conduct by preparing and providing to the parties a draft of a written agreement that memorializes the terms of the parties’ settlement reached during the course of the mediation, or by suggesting additional terms for inclusion in the draft agreement.”

Reasons for Seeking Supreme Court of Texas Approval of this Comment

The Court first approved the Guidelines in 2005. In 2011, the Section submitted amendments to the Guidelines for the Court’s approval, and the Court approved the amendments. Because the issue regarding mediators’ authority to draft MSAs has concerned Texas mediators for over a

decade, the Section wishes to clarify the issue by including the relevant language of Ethics Opinion 675 in the Guidelines. Accordingly, the Section respectfully requests the Court's approval of the Comment to Guideline 14.

The Council of the Alternative Dispute Resolution Section of the State Bar of Texas, as authorized representatives of the Alternative Dispute Resolution Section, voted unanimously in favor of this Comment. The Comment has been endorsed by every statewide organization representing mediators in Texas. Those organizations are the Texas Mediator Credentialing Association, the Texas Association of Mediators, the Dispute Resolution Centers Directors' Council, the Texas Chapter of the Association of Attorney-Mediators, the Texas Mediation Trainers Roundtable, and the Center for Public Policy Dispute Resolution.

Please feel free to contact me if you have any questions regarding this request.

Respectfully submitted,



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