

THE DEVELOPMENT OF ETHICAL GUIDELINES AND MEDIATOR CREDENTIALING IN TEXAS

By Lawrence R. Maxwell, Jr.*

This article documents the historical development of ethical guidelines for mediators and voluntary mediator credentialing in the State of Texas.

Mediation's Beginnings in Texas

Prior to the enactment of the Texas Alternative Dispute Resolution Procedures Act ("ADR Act") in 1987,¹ mediation was not widely used in Texas, most mediations were conducted at community dispute resolution centers or in the area of family law, and few mediators were attorneys.

A major step in the mediation movement among Texas attorneys began in the fall of 1988, when Judge Gary Hall of the 68th Judicial District Court of Dallas County and several Dallas attorneys ventured to Ft. Worth to observe a settlement week. The outstanding success of the settlement week prompted Judge Hall, aided by attorneys Les Weisbrod, Frank Giunta, Grant Seabolt and others, to introduce settlement week to Dallas, and to consider using professional attorney-mediators to assist in settling cases in his court.

Judge Hall and Steve Brutsché (1944-1991) soon collaborated on advancing mediation. Brutsché, a Dallas civil trial attorney, had been exposed to mediation while handling a case in California. With the encouragement and counsel of Judge Hall, in 1989, Brutsché and Dallas attorneys Hessa Abrams, Jeff Abrams, Charles Guittard, Grant Seabolt and Jay Madrid organized and conducted two mediation training sessions, sponsored by the Business Litigation Section and the newly created ADR Committee of the Dallas Bar Association.

Brutsché, along with newly trained attorney-mediators Mike Amis, Courtenay Bass, Ross Hostetter, Ross Stoddard, and Sid Stahl, made a presentation to the thirteen civil district judges of Dallas County at their annual retreat. Having seen the favorable results in Judge Hall's court and realizing the potential benefits of mediation, Judges Mark Whittington, Joe Morris and Anne Ashby joined Judge Hall in persuading all of the civil district judges to begin issuing a *sua sponte* Mediation Order. The Rules for Mediation, which were incorporated into the Order, set forth the legal and ethical obligations of the appointed mediator.²

Also in 1989, the State Bar of Texas ADR Committee (predecessor of the ADR Section) established a Task Force on Qualifications and Credentials to develop standards of practice for all ADR neutrals under the ADR Act.

An Ethics Subcommittee of the State Bar of Texas ADR Committee began drafting standards of practice for mediators. However, after meeting off and on over three years, the subcommittee produced a draft document, but had not come to a consensus on standards of practice. Mediation was spreading rapidly throughout the State. Attorneys and non-attorneys were conducting mediations, having received various types of training, but no ethical guidelines from the Bar were in place.

Dallas Bar Association's Standards of Practice for Mediators

In 1992, Orrin Harrison, President of the Dallas Bar Association, along with other Bar leaders, became concerned about the lack of ethical guidelines for mediators in Dallas, particularly for attorney-mediators. Harrison asked Sid Stahl, chair of the Dallas Bar Association's ADR Committee, to establish an Ethics Subcommittee to develop a code of ethics or standards of practice for mediators in the Dallas Bar Association. Maxel "Bud" Silverberg agreed to chair the Ethics Subcommittee (hereinafter, "Subcommittee").

The first task of the Subcommittee was to determine who would be covered by the ethical code or standards. It was apparent that to be effective, the ethical code or standards would have to apply to all individuals conducting mediations, whether they were attorneys or not. However, the Bar could only adopt an ethical code or standards for attorneys, and compliance by mediators who were not attorneys would have to be voluntary. Therefore, a diverse group of twenty-seven individuals was assembled, composed of five judges, twelve attorneys, one law professor, and nine individuals who were not attorneys.³

The next task of the Subcommittee was to determine the form and content of the ethical code or standards. Having been a member of the State Bar Task Force and having seen how little progress had been made in three years, Silverberg did not want to fall in the trap of having twenty-seven people draft the document from scratch. Drawing from key elements of the State Bar's draft document, the State of Hawaii's Standards for Mediators, SPIDR's Ethical Standards of Professional Responsibility, the Colorado Council of Mediators & Mediation Organizations, and the American Arbitration Association's Code of Ethics, Silverberg produced an initial draft. Wisely maintaining a manageable number of initial drafters, a "Committee of Six" was formed, comprised of Judges Gary Hall and Joe Morris,

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Helmut Wolfe (Regional Director of the American Arbitration Association), Don Canuteson, Robert Bliss, and Bud Silverberg.

The first meeting of the Committee of Six was in May 1992. Judge Morris suggested the document should be a living document—practical, short and direct—one that could and would be easily referenced, not placed in a desk drawer and forgotten. Following the wise advice from a wise judge, the Committee of Six agreed upon a simple format, with basic standards, followed by comments for clarification. To achieve broad coverage, the standards needed to apply to all attorney-mediators, as well as all individuals who were not attorneys, who mediated cases on referral from courts in Dallas County. It is important to note that judges on the Subcommittee opined that the Dallas Bar Association could properly promulgate ethical standards for all mediators—attorneys or not—conducting court-annexed mediations.

Between May and September 1992, the initial draft of the Committee of Six was discussed, revised again and again, line by line, in many meetings of the full Subcommittee. Later, meetings were held with representatives of the Dallas Bar Association's Board of Directors. In February and March 1993, the full ADR Committee considered the working draft. Sticky issues that had been discussed but not previously agreed upon were hashed out. For instance, should the standards be aspirational or mandatory? If mandatory, how would non-compliance be dealt with? Should the standards address mediation techniques such as facilitative vs. evaluative? What to name the document: Standards of Practice or Code of Ethics?

Approval of the full Subcommittee was finally reached on the twelfth draft, and ADR Committee subsequently approved the document. On June 24, 1993, the Board of Directors of the Dallas Bar Association unanimously approved the *Standards of Practice for Mediators*.⁴

Later in 1993, with a name change to *Ethical Guidelines for Mediators*, the Houston Bar Association and the Association of Attorney-Mediators adopted the Dallas Bar Association's *Standards of Practice for Mediators*.

On February 19, 1994, with a few minor modifications and the addition of a provision dealing with a mediator's relationship with the judiciary, the Council of the ADR Section of the State Bar of Texas unanimously adopted the *Ethical Guidelines for Mediators*.⁵

Supreme Court of Texas Advisory Committee on Court-Annexed Mediation

As mediation continued to grow rapidly throughout the state, public debate surrounded the need for oversight of the quality of mediation in Texas. In 1995, Wendy Trachte-Huber and David Cohen, then co-chairs of the ADR Section of the State Bar of Texas, requested the Supreme Court to establish a Supreme Court Advisory Committee to explore credentialing and ethical guidelines for mediators.

By Order dated May 7, 1995, the Supreme Court of Texas is-

sued its Order Creating Advisory Committee on Court-Annexed Mediation, Misc. Docket No. 96-9125.⁶ Bruce Stratton of Liberty and Bill Low of Grapevine co-chaired the Committee. The charge of the Committee was to formulate mediation ethics rules and to study whether further oversight (e.g., licensing, registration, or credentialing) was warranted.

The Supreme Court Advisory Committee gathered relevant materials from various organizations throughout the country, including organizations unrelated to the practice of law and the justice system. The committee, after meeting on numerous occasions for several years (1995-1998), found no consensus among the committee members, or within the mediation community in Texas, as to whether the Supreme Court of Texas should become involved in credentialing, registration, and/or licensing of mediators.

On March 18, 1998, the Supreme Court Advisory Committee submitted its report to the Texas Supreme Court, recommending the court establish minimum training qualifications for mediators, create a Commission on Training by appointment of the Supreme Court, and promulgate Texas Rules of Ethics for Mediations and Mediators, which were in the nature of, but did not mirror the *Ethical Guidelines for Mediators* that the ADR Section of the State Bar of Texas had adopted in 1994.

Mediator Credentialing: Mandatory or Voluntary

The indication was that the Supreme Court of Texas was going to follow the Supreme Court Advisory Committee's recommendation to promulgate rules of ethics for mediators. However, Justice Priscilla Owen, the court's liaison to the State Bar of Texas, recommended that a subcommittee be established to study the feasibility of **mandatory credentialing** for mediators under the court's rule-making authority. The subcommittee members were Suzanne Duvall, Rena Silverberg, Bud Silverberg, and Sid Stahl of Dallas, Michael Schless of Austin, and Bruce Stratton of Liberty.

In October 1998, sensing the apparent lack of interest within the mediation community for mandatory credentialing, John Palmer of Waco, then Chair of the ADR Section of the State Bar of Texas, called a meeting of representatives of leading mediator organizations in Texas to determine if the mediation community wanted to explore a **voluntary credentialing plan** for mediators in Texas. This group later became known as the Texas Mediator Credentialing Committee, forerunner of the Texas Mediator Credentialing Association (TMCA).

Over the next several years, the Supreme Court Advisory Committee and the Texas Mediator Credentialing Committee worked on developing mandatory and voluntary credentialing plans. From time to time, the Texas Legislature stuck its nose under the tent; however, it enacted no legislation. John Coselli of Houston served as a liaison between the two committees.

By 2003, it was time to stop the studying and chart a course for mediators in Texas. In October 2003, a meeting was held in John Estes' office in Dallas to resolve the issues. The choices were: (1) a court-mandated registration program; or (2) court-mandated mandatory credentialing, or (3) the voluntary credentialing program developed by TMCA; and (4) aspirational or

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mandatory ethical guidelines for mediators. The vote of the Supreme Court Advisory Committee was unanimous. Rather than establishing a court-mandated registration or a mandatory credentialing plan, the Supreme Court of Texas should adopt the ethical guidelines of the State Bar of Texas, which had been widely publicized and accepted within the mediation profession.

With a clear admonition to counsel representing parties in mediation of a pending case that they remain officers of the court in the same manner as if appearing in court, by Misc. Order No. 05-9107 dated June 13, 2005, the Supreme Court of Texas issued its Approval of Ethical Guidelines for Mediators,⁷ by adopting the *Ethical Guidelines for Mediators* that the ADR Section of the State Bar of Texas had adopted in 1994. It is interesting to note that the Supreme Court's Order states that "the rules (*Guidelines*) are *aspirational*, and that compliance depends primarily upon understanding and voluntary compliance, and secondarily upon reinforcement by peer pressure and public opinion, and **when necessary by enforcement by the courts through their inherent powers and rules already in existence . . .**"

As to the mandatory or voluntary credentialing issue, Justice Priscilla Owen, as the Texas Supreme Court's liaison to the Supreme Court Advisory Committee, instructed the committee to come up with a voluntary credentialing plan within six years, or the court would put in place a mandatory plan.

Texas Mediator Credentialing Association

Representatives of various mediator organizations and members of the judiciary had founded the Texas Mediator Credentialing Association⁸ in 2001. After many meetings, the organization decided to make mandatory the *Ethical Guidelines for Mediators* that the ADR Section of the State Bar of Texas had adopted in 1994, and establish and maintain a grievance process for TMCA credentialed mediators.

With the Texas Supreme Court's decision not to become involved in credentialing of mediators and the instruction to develop a voluntary credentialing plan, TMCA stepped to the forefront, and in January 2004, it issued its first mediator credentials to Suzanne Duvall.

At no cost to the public or the consumer of mediation services, TMCA established and continues to maintain the first statewide voluntary, multi-disciplinary mediator credentialing program in the country. The credentialing program promotes public confidence in the mediation process and mediators, and the grievance process protects consumers of mediation services and provides standards of accountability for mediators.

TMCA is truly a unique and innovative organization built on years of effort by the various mediator groups and individuals. As its membership continues to grow, the success of the organization will demonstrate that professional self-regulation is superior to governmental regulation.

Conclusion

With twenty years of good experience, it is clear that the public and ADR professionals have been well served by passage of the ADR Act. Among the tools in the ADR tool box, mediation has become the process of choice. The road to establishing ethical guidelines and a form of credentialing of mediators has been long, with bumps along the way. Nevertheless, thanks to the foresight and leadership of many individuals who devoted thousands of hours of volunteer time, mediators in Texas now have an ethical framework within which to practice their profession, and they enjoy the opportunity to participate in a voluntary credentialing program that benefits the public and the mediation profession.



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ENDNOTES

¹ TEX. CIV. PRAC. & REM. CODE ANN. §§ 154.001-154.073 (Vernon 2005), available at <http://www.texasadr.org/adract.html>.

² Original Dallas County Mediation Order and Rules for Mediation (copy on file with the ADR Coordinator for the Dallas County Courts).

³ Members of the Dallas Bar Association Ethics Subcommittee were: Judges Gary Hall, Charles Guittard, Joe Morris, Dee Miller and Theo Bedard; Attorneys Mike Amis, Robert Bliss, David Carlock, Don Canuteson, Peter Chantillis, Jay Madrid, Larry Maxwell, Jay Patterson, Randy Pulitzer, Grant Seabolt, Bud Silverberg, and Ross Stoddard; SMU Law Professor Kenneth Penegar; and individuals who were not attorneys: Susanne Adams, Debbie Andrews, Herb Cooke, Richard Evarts, Linda Hahan, Virginia Talkington, Liz Walley and Helmut Wolfe.

⁴ *Standards of Practice for Mediators* adopted by the Board of Directors of the Dallas Bar Association on June 24, 1993 (copy on file with the Dallas Bar Association).

⁵ *Ethical Guidelines for Mediators* adopted by the Council of the ADR Section of the State Bar of Texas in February, 1994, <http://www.texasadr.org/ethicalguidelines.html>.

⁶ The members of the Supreme Court Advisory Committee on Court-Annexed Mediation were: Tony Alvarado, Karl Bayer, Gary Condra, Herb Cooke, Hon. Suzanne Covington, Claude Ducloux, Suzanne Duvall, John Estes, Hon. Frank Evans, Hon. Charles Gonzalez, Carol Hoffman, Dr. Lou Lasher, Bill Low, Hon. Tom McDonald, Hon. Margaret Mirabal, Lanelle Montgomery, William M. Morris, Hon. Jay Patterson, Ross Rommel, Michael J. Schless, Maxel ABud@Silverberg, Rena Silverberg, Sid Stahl, Bruce Stratton, and Michael Wolf.

⁷ Supreme Court of Texas Misc. Order No. 05-9107: Standards: Mediator Guidelines, <http://www.supreme.courts.state.tx.us/rules/rules.asp>.

⁸ Website of the Texas Mediator Credentialing Association, <http://www.txmca.org>.