

**THE PROFESSIONAL ETHICS COMMITTEE
FOR THE STATE BAR OF TEXAS
Opinion No. 675**

August 2018

QUESTIONS PRESENTED

May a Texas lawyer, acting as a mediator, prepare and provide the parties to 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 during the mediation?

STATEMENT OF FACTS

A Texas lawyer acts as mediator in a dispute between two parties who reach an oral agreement during the mediation. The lawyer-mediator drafts a written settlement agreement, incorporating the agreed terms, and presents it to the parties for review and signing. The lawyer-mediator suggests some provisions in the draft agreement that do not conflict with the parties' oral agreement but were not expressly discussed during the mediation session.

DISCUSSION

Under the Texas Disciplinary Rules of Professional Conduct, serving as a mediator constitutes acting as an "adjudicatory official." The Terminology section of the Rules defines "Adjudicatory Official" as "a person who serves on a 'Tribunal,'" which is defined to include mediators "and comparable persons empowered to resolve or to recommend a resolution of a particular matter[.]"

As an "adjudicatory official" under the Rules, a lawyer acting as a mediator is subject to the requirements of Rule 1.11. Subsection (a) of that Rule provides that "[a] lawyer shall not represent anyone in connection with a matter in which the lawyer has ... participated personally and substantially as an adjudicatory official ... unless all parties to the proceeding consent after disclosure." Rule 1.11(b) provides that "[a] lawyer who is an adjudicatory official shall not negotiate for employment with any person who is involved as a party or as attorney for a party in a pending matter in which that official is participating personally and substantially."

Professional Ethics Committee Opinion 583 (September 2008) considered whether a mediator could agree to mediate a divorce between unrepresented parties and prepare all

of the documents necessary to effect an agreed divorce if an agreement resulted from the mediation. The agreement between the mediator and the parties thus required the mediator to prepare the decree of divorce and other documents, possibly including real property conveyances, releases, child support provisions, and visitation schedules. The Opinion found that such an arrangement would violate Rule 1.11(b) because the lawyer would be agreeing in advance to provide legal representation to both parties in the divorce case. Furthermore, undertaking such representation would violate Rule 1.06(a), which prohibits lawyers from representing opposing parties to the same litigation. Opinion 583 concluded: “Under the Texas Disciplinary Rules of Professional Conduct, 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 effect 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 effect the terms of an agreed divorce.”

In contrast to the question addressed in Opinion 583, a mediator who prepares a written settlement agreement that memorializes the terms agreed to by the parties during the mediation is not engaged in legal representation and therefore does not violate Rules 1.11 or 1.06. Assisting in memorializing mediated settlement terms is consistent with a mediator’s traditional role. *See generally* Ethical Guidelines for Mediators (Tex. Sup. Ct. Misc. Docket No. 11-9062, April 11, 2011) (“Guidelines”), Comment to Guideline 1 (“[a] mediator's obligation is to assist the parties in reaching a voluntary settlement”) and Guideline 14 (“[a] mediator should encourage the parties to reduce all settlement agreements to writing”). Preparing a draft of a writing to memorialize the parties’ oral agreement is part of the normal mediation process and is distinct from drafting court papers or other ancillary legal instruments that may be needed to effectuate the settlement agreement.

It is not uncommon for a mediator to include proposed terms in a draft settlement agreement in addition to, but consistent with, the express terms of the parties’ oral agreement. For example, some mediators may propose that the written settlement agreement include a process for resolving disputes that may arise under the settlement agreement, even if the parties did not discuss that specific issue during the mediation session. Likewise, mediators may suggest that the parties to a divorce mediation include the language required by statute to make the settlement agreement binding. *See* Tex. Family Code § 6.602 (providing that a mediated settlement agreement is binding if it “provides, in a prominently displayed statement that is in boldfaced type or capital letters or underlined, that the agreement is not subject to revocation”). Although a mediator should ensure that the parties are aware that such additional terms are suggestions, a mediator does not engage in legal representation by making such suggestions, whether during the initial settlement negotiations or during the process of assisting the parties in reducing their agreement to writing.

The scope of this opinion is limited to whether a lawyer-mediator violates the Texas Disciplinary Rules of Professional Conduct by preparing and providing the parties with a draft of a written settlement agreement. This opinion does not purport to address the obligations of mediators generally, which obligations may be defined by other laws or

ethical guidelines. For example, the Texas Supreme Court has advised that a mediator should ensure that unrepresented parties understand that the mediator is not providing legal representation and that there may be risks in proceeding without independent counsel or other professional advisors. (Guideline 7, Comment; Guideline 11.) In appropriate circumstances, a mediator should encourage the parties to seek legal, financial, tax, or other professional advice before, during, or after the mediation process. (Guideline 11, Comment (a).) Further, a lawyer may owe a common law duty to warn a non-client of the lawyer's non-representation when the lawyer is aware or should have been aware that the lawyer's conduct would have led a reasonable person to believe that the lawyer was representing that person. *Burnap v. Linnartz*, 914 S.W.2d 142, 149 (Tex. App.—San Antonio 1995, writ denied). Nothing in this opinion should be read to the contrary.

CONCLUSION

A Texas lawyer, acting as 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.