

# **ETHICS OPINION 675 DECLARES THAT ATTORNEYS ACTING AS MEDIATORS MAY DRAFT MEDIATED SETTLEMENT AGREEMENTS BUT LEAVES THE QUESTION UNANSWERED FOR OTHER MEDIATORS**

**By Walter A. Wright\***

## **I. Introduction**

Ever since the [Professional Ethics Committee](#) of the State Bar of Texas (“PEC”) issued its [Opinion 583](#) in September 2008, attorneys who act as mediators have debated whether that opinion prohibited them from preparing a proposed written settlement agreement that memorializes the terms of the parties’ agreement reached during mediation. In August 2018, in its [Opinion 675](#), the PEC declared that attorneys acting as mediators may, indeed, prepare and present such an agreement to the parties. This article provides basic information about the PEC, discusses Opinion 583 and the concerns it created, and the PEC’s clarification, in Opinion 675, of an attorney’s proper role when acting as a mediator of a dispute in which the parties reach an agreement. It also discusses a question that Opinion 675 left unanswered for mediators who are not attorneys and proposes suggestions for working towards an answer to the question.

## **II. The PEC**

[Section 81.091 of the Texas Government Code](#) establishes the PEC, which consists of nine members of the State Bar of Texas appointed by the Supreme Court of Texas. Each member serves a three-year term, and the terms of three members expire each year. [Section 81.092 of the Texas Government Code](#) authorizes the PEC to issue opinions on the propriety of lawyers’ professional conduct and requires the committee to explain its rationale for each opinion. The PEC’s opinions, while persuasive authorities, are not binding on the Supreme Court of Texas.

## **III. Opinion 583**

The PEC issued 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?”

In answering this question, the PEC first pointed out that under the disciplinary rules governing attorney ethics, “mediation does not constitute the practice of law but instead constitutes action as an ‘adjudicatory official.’” The disciplinary rules define “‘Adjudicatory

Official’ to mean a person who serves on a ‘Tribunal’”; the rules further define “‘Tribunal’ to include a mediator engaged in resolving or recommending resolution of a particular dispute or controversy.” Next, the PEC pointed out that Rule 1.11(b) of the disciplinary rules prohibits a lawyer acting as an adjudicatory official from “negotiat[ing] for employment with any person who is a party . . . in a pending matter in which the adjudicatory official is participating personally and substantially.” A pending mediation is clearly such a pending matter, the PEC found. In addition, the PEC pointed out that Rule 1.06(a) of the same rules prohibits a lawyer from representing “opposing parties to the same litigation.” Because a divorce proceeding is a litigation matter, an attorney cannot represent two divorcing spouses by preparing their divorce decree or other documents necessary to effectuate their agreed divorce.

Given its understanding of the relevant ethical rules and their application to the question posed, the PEC reached the following conclusion in Opinion 583: “[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.”

#### **IV. The Controversy about the Meaning of Opinion 583**

Some attorneys acting as mediators interpreted the language of 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 a mediator 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 Opinion 583 less expansively. They observed that MSAs were not within the scope of the question Opinion 583 answered. They also reasoned that providing assistance to 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 Opinion 583 would impede mediators from providing a service that many parties considered imperative.

After almost eight years of disagreement among mediators about the proper interpretation of Opinion 583’s language, the author of this article decided to ask the PEC for clarification of its meaning. The author sent the request for clarification to the PEC in March 2016.

## V. Opinion 675

Opinion 675, issued in August 2018, considered the following two 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?”

In answering the first question, the PEC began by reviewing Opinion 583 and its rationale based on the definitions of “Adjudicatory Official” and “Tribunal” in the disciplinary rules and its application of Rules 1.11(b) and 1.06(a) of the same rules. “In contrast to the question raised in Opinion 583,” the PEC declared, “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.” Next, citing the Ethical Guidelines for Mediators issued by the Alternative Dispute Resolution Section of the State Bar of Texas (and approved by the Supreme Court of Texas most recently in 2011), the PEC declared: “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.”

To answer the second question, the PEC began by noting, “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.” After providing examples of possible proposed terms and cautioning that “a mediator should ensure that the parties are aware that such additional terms are suggestions,” the PEC concluded, “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 PEC cautioned against an expansive application of Opinion 675: “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.” Examples the PEC provided included ethical rules and case law requiring a mediator to ensure that unrepresented parties understand the mediator is not a legal advisor and that it may be risky for parties to participate in mediation without proper legal or other professional advice.

After cautioning readers against expansive application of its opinion, the PEC concluded: “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.”

## VI. An Important Unanswered Question

The PEC may only opine on the professional behavior of attorneys; therefore, it does not have jurisdiction to provide guidance for mediators from other professional backgrounds. Everyone should take seriously the PEC's admonishment against an expansive application of Opinion 675. Nevertheless, a question many mediators will have is whether Opinion 675 may affect the practices of mediators from other professional backgrounds or lawyers from other states who practice mediation in Texas. This author believes that Opinion 675 should not adversely affect the practices of any mediators, regardless of professional background.

Opinion 675, in addition to providing additional support for Opinion 583's declaration that “mediation does not constitute the practice of law but instead constitutes action as an ‘adjudicatory official[,]’” expressly declares that “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 . . . .” It also declares that a mediator does not engage in legal representation by proposing terms in a draft settlement agreement that are consistent with the terms of the parties' oral agreement. In these portions of the opinion, the PEC did not limit its language to Texas lawyers as it did elsewhere in the opinion. This language appears to be at least a tacit recognition that not everyone who is an “Adjudicatory Official” who serves on a “Tribunal” as defined in the disciplinary rules is a lawyer. For example, the ethical rules' definition of “Tribunal” includes “judges, magistrates, special masters, referees, arbitrators, mediators, hearing officers and comparable persons empowered to resolve or to recommend a resolution of a particular matter . . . .” Some judges, such as [Texas justices of the peace](#), are not lawyers; some arbitrators, such as those listed on the [National Roster of Arbitrators of the American Arbitration Association](#), are not lawyers; and we all know (many of us are) mediators who are not lawyers. Yet all of these people without licenses to practice law fit the definition of a Tribunal under the disciplinary rules upon which both Opinion 583 and Opinion 675 rely.

The problem with relying exclusively on definitions from the ethical rules governing Texas lawyers to answer a question about mediators who are not Texas lawyers is that the ethical rules apply only to Texas lawyers. Moreover, to attempt to apply Opinion 675 to mediators who are not lawyers would fly in the face of the opinion's admonishment against expansive application. The unauthorized practice of law, which is the concern at the root of this question, could well be one of those “other laws” the PEC had in mind when it limited the scope of Opinion 675.

In an ideal world, Texas statutory law would contain another definition of “Adjudicatory Official” or “Tribunal”—or something—to guide members of other professions to an answer as to whether they are permitted to draft mediated settlement agreements. The [Texas Alternative Dispute Resolutions Procedures Act](#) certainly does not limit mediation practice to attorneys, but this author has been unable to find specific Texas statutory guidance or case law to answer this question. One logical idea would be to request an advisory opinion from the [Texas Unauthorized Practice of Law Committee](#), but that committee is prohibited from providing advisory opinions.

## VII. Suggestions for Working Towards an Answer to the Question

First in [2005](#), and most recently in [2011](#), the Supreme Court of Texas approved the Ethical Guidelines for Mediators (“Guidelines”) issued by the Alternative Dispute Resolution Section of the State Bar of Texas (“ADR Section”). The Guidelines, while promulgated by a section of the State Bar of Texas, “are intended to apply to mediators conducting mediations in connection with all civil, criminal, administrative and appellate matters, whether the mediation is pre-suit or court-annexed and whether the mediation is court-ordered or voluntary.” Their application is not limited to Texas lawyers.

Guideline 14 of the current Guidelines provides, “A mediator should encourage the parties to reduce all settlement agreements to writing.” There are no comments to Guideline 14 at all. Now that the PEC has issued Opinion 675, perhaps Guideline 14 could be supplemented with comments containing the following language taken from the opinion:

- 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.
- Preparing a draft of a writing to memorialize the parties’ oral agreement is part of the normal mediation process.
- A mediator may include proposed terms in a draft settlement agreement in addition to, but consistent with, the express terms of the parties’ oral agreement, so long as the mediator ensures 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.

Such language, if included as comments to Guideline 14, would clarify that all mediators may perform the sort of tasks that Opinion 675 authorizes for mediators who are attorneys.

If the ADR Section adopted such language, or similar language, it could submit the amended Guidelines to the Supreme Court of Texas for review, as it has done in the past. If the high court approved the language, all mediators could rest assured that they could draft

settlement agreements without fear of engaging in unethical conduct or the unauthorized practice of law.

The Texas Mediator Credentialing Association (TMCA) could consider a similar course of action.

### **VIII. Conclusion**

The PEC's Ethics Opinion 675 is an important step in clarifying a mediator's authorization to draft a writing to memorialize the parties' oral agreement reached during mediation. The opinion applies only to mediators who are attorneys, and rightly so given the PEC's limited jurisdiction. However, in this author's opinion, it is important to clarify whether mediators from other backgrounds have the same authorization to draft settlement agreements as mediators who are attorneys. The ADR Section could lead the clarification process by incorporating language from Opinion 675 into its Guidelines and seeking approval of that language from the Supreme Court of Texas. The TMCA could consider a similar course of action. The effort to obtain clarification of this issue would be an important step towards assuring equality of treatment for all Texas mediators.

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