The use of mediation in small claims cases encourages fast and inexpensive justice. Mediation helps ‘move’ court dockets and permits the judge to focus on cases not appropriate for mediation. Mediation allows the possibility of expedited reconciliation, settlement, or understanding between or among them. The parties in a small claims proceeding in a justice of the peace court may or may not be represented by an attorney, but the substantive law governing mediation in a small claims proceeding is the same as a civil suit in a higher court. The parties, at the discretion of the assigned judge, may be sent to mediation because the policy of Texas is to encourage the peaceful resolution of disputes. In Decker v. Lindsay the court discussed the authority of a judge to order the parties to mediation. The court in Decker held that the judge cannot compel the parties to settle their dispute, but a judge does have the authority to compel litigants to sit down with each other and engage in ADR procedures, unless a party makes a reasonable objection. Objections must be filed in writing within ten days after receiving notice of the court’s decision to refer the case to alternative dispute resolution. If mediation fails (the parties reach an “impasse”) and the matter is not otherwise settled, then the case proceeds to trial.
Mediation is useful in healing divisions between parties and it can help preserve business and personal relationships. If a relationship between the parties is to survive the dispute, mediation is the better alternative to adversarial litigation.9 As stated in a 1984 note in the Harvard Law Review, “[a]t best, mediation can turn conflict into a constructive process; at the very least, it gives parties a chance to preserve ongoing relationships or make the termination of a relationship less destructive.”10

The mediator is a neutral, disinterested third party acting as a sounding board to draw out the parties' interests. The mediator is not a judge and has no decision-making authority. Mediators help the parties to identify plausible solutions and to craft a settlement agreement. If agreement is reached, it is reduced to writing and signed by both parties. The signed agreement is, in effect, a contract between the parties.

A successful mediation depends on the cooperation and input of the parties. The parties influence the mediation session by describing the dispute from their own point of view. Exploration is also done on how they think the dispute can be resolved. Discussions rally around building an agreement that both parties can “live with” and realistically fulfill.

For mediation to progress, there has to be trust in the room and confidentiality rules are believed to be a prerequisite to trust. There has to be “trust” between the parties as well as between the parties and the mediator. Trust is vital to the mediation process, because it fosters communication. As one author explains it, “In normal interpersonal relationships trust is built on past positive experiences” and, in mediations, “two people who know from past experience they should not trust each other are thrust together against their will and expected to give their most immediate enemy the tools needed to cause great emotional pain and financial damage.”11 Parties working without the safety net of confidentiality may fear that communications with the mediator could be conveyed informally even to the assigned judge, chilling the mediation atmosphere.12

Confidentiality rules are necessary to cradle the mediation process and govern trust. Mediation communications are communications between adversaries. There should be no illusions to the fact that the parties are opponents in a dispute. Confidentiality rules limiting disclosure of communications protect parties from disclosure to outsiders and provide a “trust substitute” between the parties communicating.13 As the Texas Court of Appeals in Austin recently stated, “[A] 'cloak of confidentiality' surrounds mediation, and the cloak should be breached only sparingly.”14

The Texas rules defining mediation confidentiality are found at section 154.053(c) and section 154.073 of the Texas Civil Practice and Remedies Code. These sections provide that all matters disclosed or occurring during mediation, and any record made during the procedure, are confidential, and generally may not be disclosed to anyone, including the court referring the case and appointing the mediator, unless the parties agree otherwise. A communication relating to the subject matter of the dispute made by a participant in mediation, whether before or after suit has been filed, may not be used as evidence against the participant in any judicial or administrative proceeding.15 Neither the parties nor the mediator may be required to testify in any proceedings relating to or arising out of the matter in dispute.16 Nor may they be subjected to any process requiring disclosure of confidential information or data relating to or arising out of the matter in dispute.17

The confidentiality rules do not knit a blanket rule of confidentiality, however, because of exceptions found in section 154.073. For example, including disclosures may be required due to “duty to report elder and child abuse or neglect” in subsection (f), and an oral communication or written material used in mediation is admissible or discoverable if it is admissible or discoverable independent of the mediation.18 Further, if the rule making communications made during confidential mediation conflicts with other legal requirements for the disclosure of communications or materials, the court may determine in camera whether the communications or materials are subject to disclosure, or whether a protective order is warranted.19

Even the confidentiality protection that is given to mediation by Texas statutes is not absolute. Under Texas law, all matters, including the conduct and demeanor of the parties and their attorneys during the settlement process are confidential and communications relating to the subject matter of the dispute made by a participant in an alternative dispute resolution procedure is confidential and not subject to disclosure.20 The case law surrounding the confidentiality of mediations under this statute, and defining boundaries is conflicting at best.

Appellate courts have interpreted the rules various ways when requests are made post-mediation for testimony or information to support sanctions relating to the mediation. The First Court of Appeals, as discussed above, laid the groundwork in Decker v. Lindsay for mediation boundaries.21 Responding to the trial court judge’s order issued in the Decker case requiring the parties to go to mediation and additionally requiring them to “participate in the proceedings in good faith,” the court acknowledged the trial court has the authority to mandate that the parties go to mediation, but held the parties could not be forced to make good-faith efforts to settle during mediation.22 The reach of Texas ADR statutes, according to Decker, is mandatory “referral” to mediation, but it is not mandatory “resolution.”23

The trial judge’s reach into the mediation room often extends further than merely a “referral.” For example, the trial court in Texas Parks and Wildlife Dept. v. Davis overruled an objection to mediate filed by the Department.24 The Department attended the mediation and even made an offer.25 Despite this, the court sanctioned the department for failure to negotiate in good faith. The appellate court held the sanctions were not warranted considering the facts of the case.26 Furthermore, the appellate court stated that the confidentiality of what happened in the mediation room was protected by section 154.073, which requires “communications and records made in an ADR procedure remain confidential; consequently, the manner in which the participants negotiate should not be disclosed to the trial court.”27 Similarly, the court in In re Acceptance Ins. Co. quoted Davis in its reasoning, stating that

The court acknowledged the trial court has the authority to mandate that the parties go to mediation, but held the parties could not be forced to make good-faith efforts to settle during mediation.
the trial court judge abused his discretion in overruling objections to testimony about a party’s manner of mediation, engaging in consultations with other participants during mediation, refusing to accept information for in camera determination of confidentiality, and in sanctioning a party for failure to comply with his mediation order requiring good faith negotiation.28

In re Daley, however, declined to honor the broad confidentiality of the mediation, and refused to follow Davis. The trial court judge’s order to mediate in Daley stated that failure to attend or remain in attendance at the mediation until the mediation concluded would be sanctioned as contempt.29 When a party was sanctioned post-mediation for leaving the mediation prior to its conclusion without the permission of the mediator, the sanctioned party objected to the sanction and to basing the sanction on any testimony or evidence regarding whether he had the mediator’s permission to leave the mediation.30 The sanctioned party argued the confidentiality provision in section 154.053(c) “precludes disclosure of all matters relating to the mediation, including conduct and demeanor of the parties and their counsel.”31 The appellate court disagreed and restricted the statute’s meaning to those matters occurring during the “settlement process.”32 Whether the party left the mediation early without the permission of the mediator “is not a matter related to the settlement process itself.”33 Therefore, confidentiality protection did not extend to matters unrelated to the “settlement process.”

The support for the motion for sanctions in Daley was found in a deposition of the sanctioned party ordered by the trial judge post-mediation involving questions about events in the mediation room.34 The sanctioned party objected to the deposition order as a violation of section 154.073, relying on the holding in Davis (“all communications, conversations, and records made in an ADR proceeding remain confidential”).35 The appellate court replied, “If the Austin court’s holding means that all communications and records made in an ADR proceeding remain confidential, we do not follow it.”36 The Daley court’s interpretation of section 154.073 is “not so broad as to bar all evidence regarding everything that occurs at mediation from being presented in the trial court.”37 The Daley court stressed the fact that only “communication relating to the subject matter of any civil or criminal dispute” is confidential.38 “Here, the matter in contention concerns only the procedural issue of attendance, not the subject matter of the dispute being mediated.”39

The appellate court in Avary v. Bank of America used the Daley line of reasoning to hold that if communication made by the participant in alternative dispute resolution procedure does not relate to subject matter of the dispute or does not relate to or arise out of the matter in dispute, it may not be confidential.40 The Avary court, however, limited it’s holding to the specific facts before it.41

The overall effect of Texas appellate cases seems to chip away at the confidentiality rules. The Texas rules provide, “unless the parties otherwise agree,” 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.42 Since confidentiality is not absolutely protected in Texas, can a written agreement between the parties signed prior to mediation concerning confidentiality secure it? The answer is probably not. As at least one authority has noted, private confidentiality party agreements are typically disfavored.43

Despite the obvious benefits of confidentiality, some courts left unrestrained will continue to encroach on the mediation process. As the appellate cases demonstrate, Texas judges continue to struggle with avoiding encroachment while still trying to pursue sanctions for parties abusing and disrespecting the mediation process. If the Daley line of reasoning is followed, where will the line be drawn marking the “settlement process” boundaries? Will the ranting and raving of a party in mediation be deemed protected as confidential information relating to the subject matter in the settlement process – or, does the fact that the party is ranting and raving signal that the “settlement process” is over? Confidentiality rules protecting mediation have a purpose – to promote the trust needed in the mediation process. Judges should be careful to limit their intrusion into that process.

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1. TEX. CIV. PRAC. & REM. CODE ANN. § 152.003.
2. Id; TEX. CIV. PRAC. & REM. CODE ANN. § 154.021(a).
3. TEX. CIV. PRAC. & REM. CODE ANN. § 154.023(a).
6. TEX. CIV. PRAC. & REM. CODE ANN. § 154.022(e).
7. TEX. CIV. PRAC. & REM. CODE ANN. § 154.022(b).
13. Id. at 81-82.
15. TEX. CIV. PRAC. & REM. CODE ANN. § 154.073(a).
16. TEX. CIV. PRAC. & REM. CODE ANN. § 154.073(b).
17. Id.
18. TEX. CIV. PRAC. & REM. CODE ANN. § 154.073(c).
19. TEX. CIV. PRAC. & REM. CODE ANN. § 154.073(e).
20. TEX. CIV. PRAC. & REM. CODE ANN. §§ 154.053,
22. Id. at 251-52.
23. Id. at 251.
25. Id.
26. Id.
27. Id.
30. Id. at 918.
31. Id.
32. Id.
33. Id.
34. Id. at 917.
35. Id. at 917-18.
36. Id. at 918.
37. Id.
38. Id.
39. Id.
41. The issue here concerned a post-mediation tort based on a duty to disclose resulting from a bank's breach of fiduciary duty when the bank rejected a higher settlement offer during a mediation. Id. at 803.
42. TEX. CIV. PRAC. & REM. CODE ANN. § 154.053(c).