

CHAPTER 27. RULES FOR ADMINISTRATIVE SERVICES.

Subchapter C. NEGOTIATION AND MEDIATION OF CERTAIN CONTRACT DISPUTES.

DIVISION 4. ASSISTED NEGOTIATION PROCESSES.

§27.145. Use of Assisted Negotiation Processes.

Any of the following methods, or a combination of these methods, or any assisted negotiation process agreed to by the parties, may be used in seeking resolution of disputes or other controversy arising under Texas Government Code, Chapter 2260. If the parties agree to use an assisted negotiation procedure, they should agree in writing to a detailed description of the process prior to engaging in the process.

- (1) Mediation. (See Division 3 in this subchapter (relating to Mediation of Contract Disputes)).
- (2) Early evaluation by a third-party neutral.
 - (A) This is a confidential conference where the parties and their counsel present the factual and legal bases of their claim and receive a non-binding assessment by an experienced neutral with subject-matter expertise or with significant experience in the substantive area of law involved in the dispute.
 - (B) After summary presentations, the third-party neutral identifies areas of agreement for possible stipulations, assesses the strengths and weaknesses of each party's position, and estimates, if possible, the likelihood of liability and the dollar range of damages that appear reasonable to him or her.
 - (C) This is a less complicated procedure than the mini-trial, described in paragraph (4) of this section. It may be appropriate for only some issues in dispute, for example, where there are clear-cut differences over the appropriate amount of damages. This process may be particularly helpful when:
 - (i) The parties agree that the dispute can be settled;
 - (ii) The dispute involves specific legal issues;
 - (iii) The parties disagree on the amount of damages;
 - (iv) The opposition has an unrealistic view of the dispute; and
 - (v) The neutral is a recognized expert in the subject area or area of law involved.
- (3) Neutral fact-finding by an expert.
 - (A) In this process, a neutral third-party expert studies a particular issue and reports findings on that issue. The process usually occurs after most discovery in the dispute has been completed and the significance of particular technical or scientific issues is apparent.
 - (B) The parties may agree in writing that the fact-finding will be binding on them in later proceedings (and entered into as a stipulation in the dispute if the matter proceeds to contested case hearing), or that it will be advisory in nature, to be used only in further settlement discussions between representatives of the parties. This process may be particularly helpful when:
 - (i) Factual issues requiring expert testimony may be dispositive of liability or damage issues;
 - (ii) The use of a neutral is cost effective;
 - (iii) The neutral's findings could narrow factual issues for contested case hearing.
- (4) Mini-trial.
 - (A) A mini-trial is generally a summary proceeding before a representative of upper management from each party, with authority to settle, and a third-party neutral selected by agreement of the parties. A mini-trial is usually divided into three phases: a limited information exchange phase, the actual hearing, and post-hearing settlement discussions. No written or oral statement made in the proceeding may be used as evidence or an admission in any other proceeding.
 - (B) The information exchange stage should be brief but it must be sufficient for each party to understand and appreciate the key issues involved in the case. At a minimum, parties should exchange key exhibits, introductory statements, and a summary of witness's testimony.

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- (C) At the hearing, representatives of the parties present a summary of the anticipated evidence and any legal issues that must be decided before the case can be resolved. The third-party neutral presides over the presentation and may question witnesses and counsel, as well as comment on the arguments and evidence. Each party may agree to put on abbreviated direct and cross-examination testimony. The hearing generally takes no longer than one - two days.
- (D) Settlement discussions, facilitated by the third-party neutral, take place after the hearing. The parties may ask the neutral to formally evaluate the evidence and arguments and give an advisory opinion as to the issues in the case. If the parties cannot reach an agreed resolution to the dispute, either side may declare the mini-trial terminated and proceed to resolve the dispute by other means.
- (E) Mini-trials may be appropriate when:
 - (i) The dispute is at a stage where substantial costs can be saved by a resolution based on limited information gathering;
 - (ii) The matter justifies the senior executive time required to complete the process;
 - (iii) The issues involved include highly technical mixed questions of law and fact;
 - (iv) The matter involves trade secrets or other confidential or proprietary information;
or
 - (v) The parties seek to narrow the large number of issues in dispute.