

TITLE 28. INSURANCE
Part I. Texas Department of Insurance
Chapter 5. Property and Casualty Insurance

§5.4200. Definitions. The following definitions apply to this division:

(1) Appraiser--A person who is qualified to be an appraiser under §5.4212 of this title (relating to Appraisal Process – Appraiser Qualifications and Conflicts of Interest) and is selected by the association or a claimant to participate in the appraisal process.

(2) Association--Texas Windstorm Insurance Association. “Association” includes any authorized representative of the Texas Windstorm Insurance Association.

(3) Claimant--A person who makes a claim under an association policy.

(4) Department--The Texas Department of Insurance.

(5) Mediator--A person who is qualified to be a mediator under §5.4232 of this title (relating to Mediation Process – Mediator Qualifications and Conflicts of Interest).

(6) Mediator roster--The roster of mediators maintained by the department.

(7) Mediator selection panel--A short list of potential mediators from the mediator roster from which the department will select a mediator.

(8) Party--The association or the claimant. “Party” includes employees and other representatives of a party.

(9) Umpire--A person who is qualified to be an appraisal umpire under §5.4214 of this title (relating to Appraisal Process – Umpire Qualifications and Conflicts of Interest) and is selected by the appraisers or the department to participate in the appraisal process.

(10) Umpire roster--The roster of umpires maintained by the department.

(11) Umpire selection panel--A short list of potential umpires from the umpire roster from which the department will select an umpire.

§5.4211. Appraisal Process.

(a) Applicability. Sections 5.4211 - 5.4222 of this title are the appraisal process and apply when:

(1) the association has accepted coverage for a claim, in full or in part;

(2) the claimant disputes the amount of loss the association will pay for the accepted portion of the claim; and

(3) the claimant demands an appraisal under the association policy within the time frame allowed by Insurance Code §2210.574.

(b) Appraisal explanation. The association must include an explanation of the appraisal process with the notice accepting or denying coverage under Insurance Code §2210.573.

(c) Appraiser selection. The association and the claimant must each select an appraiser who is independent and qualified under §5.4212 of this title (relating to Appraisal Process – Appraiser Qualifications and Conflicts of Interest).

(d) Appraiser fee information. No later than five days after hiring an appraiser, each party must tell the other party the fees to be charged by the appraiser.

(e) Umpire selection.

(1) The appraisers must select an umpire who is independent and qualified under §5.4214 of this title (relating to Appraisal Process – Umpire Qualifications and Conflicts of Interest).

(2) If the appraisers are unable to agree on an umpire, either appraiser may request the department to select an umpire. The appraiser must submit the request under §5.4251 of this title (relating to Requests and Submissions to the Department). The request must include the following information:

- (A) the type of policy;
- (B) a description of the claim and, if known, the claimed value of the covered loss;
- (C) the association's claim acceptance letter, including the amount the association will pay for the loss; and
- (D) any other information that the department requests.

(f) Umpire participation. The selected umpire must participate in the resolution of the dispute if the appraisers fail to agree on a decision.

(g) Decision. If the appraisers agree on the amount of loss, their decision is binding on the parties as to the amount of loss the association will pay for the claim. If the parties cannot agree, and the umpire participates, an itemized decision agreed to by any two of these three is binding on the parties as to the amount of loss the association will pay for the claim. Parties may challenge the decision only as permitted by Insurance Code §2210.574.

§5.4212. Appraisal Process – Appraiser Qualifications and Conflicts of Interest. (a) Qualifications. To qualify as an appraiser, a person must be one of the following:

- (1) an engineer or architect with experience and training in building construction, repair, estimating, or investigation of property damage;
- (2) an adjuster or public adjuster with experience and training in estimating property damage; or
- (3) a general contractor with experience and training in building construction, repair, or estimating property damage.

(b) Potential conflicts. A potential conflict of interest exists when an appraiser:

- (1) is a current or former association or claimant employee;
- (2) is a current or former association or claimant contractor or contractor's employee, except that it is not a potential conflict for the appraiser to be a contractor solely to work on the pending appraisal;

(3) is related within a degree of relationship described by Government Code §573.002 to:

- (A) a current or former association employee;
 - (B) a current or former association contractor or contractor's employee;
 - (C) the claimant or a representative of the claimant;
 - (D) a current or former claimant employee; or
 - (E) a current or former claimant contractor or contractor's employee;
- (4) is a current association policyholder;

(5) currently has an open claim or acts as a representative or public adjuster on an open claim with the association, or previously filed a claim with the association;

(6) is a current employee or contractor of an insurance company or public insurance adjusting company;

(7) currently is a party or represents a party to a lawsuit with the association, or was a party or represented a party to a lawsuit with the association within the previous five years;

(8) adjusted the loss or acted as a public adjuster on the loss involved in the claim;

(9) is related to the adjuster or public adjuster who adjusted the loss;

(10) is an employee of the adjusting company or public insurance adjusting company that adjusted the loss or represented the claimant on the loss; or

(11) has any other direct or indirect interest, financial or otherwise, of any nature that substantially conflicts with the appraiser's duties.

§5.4213. Appraisal Process – Appraiser Obligations.

(a) Conflicts. An appraiser must disclose to both parties any potential conflicts of interest no later than the fifth day after being hired, and before the appraiser begins work on the appraisal. Potential conflicts of interest are listed in §5.4212 of this title (relating to Appraisal Process – Appraiser Qualifications and Conflicts of Interest).

(b) Withdrawal prohibited. After an appraiser has accepted the responsibility for an appraisal, the appraiser may not withdraw or abandon the appraisal unless compelled to do so by unanticipated circumstances that would render it impossible or impractical to continue. The appraiser may not charge a fee for services if the appraiser withdraws or abandons the appraisal.

(c) Postponement. An appraiser must postpone the appraisal for a reasonable amount of time if a party shows good cause for a postponement.

(d) Duties. An appraiser must:

(1) consider all information provided by the parties and any other reasonably available evidence material to the claim;

(2) follow the association insurance policy when making the appraisal decision;

(3) carefully decide all issues submitted for determination regarding the amount of loss; and

(4) give the parties and the other appraiser an itemized written appraisal.

(e) Fairness. An appraiser must conduct the appraisal process to advance the fair and efficient resolution of the matters submitted for decisions.

(f) Independence. An appraiser may not:

(1) permit outside pressure to affect the appraisal; or

(2) delegate the duty to decide to any other person.

(g) Prohibited communications. An appraiser may not communicate with an appraisal umpire without including the other party or the other party's appraiser, except as permitted under §5.4220 of this title (relating to Appraisal Process – Prohibited Communications).

§5.4214. Appraisal Process – Umpire Qualifications and Conflicts of Interest.

- (a) Required qualifications. To qualify as an umpire, a person must:
- (1) be one of the following:
 - (A) an engineer or architect with experience and training in building construction, repair, estimating, or investigation of property damage;
 - (B) an adjuster or public adjuster with experience and training in estimating property damage;
 - (C) a general contractor with experience and training in building construction, repair, or estimating property damage;
 - (D) a licensed attorney; or
 - (E) a current or former judge of any Texas court of record or the State Office of Administrative Hearings; and
 - (2) not have any disqualifying conflicts of interest listed in subsection (d) of this section.
- (b) Preferred qualifications. The following qualifications are preferred:
- (1) experience with the appraisal of property damage claims; and
 - (2) experience as an appraisal umpire on at least three property damage claims in the previous 12 months.
- (c) Potential conflicts. A potential conflict of interest exists when an umpire:
- (1) is a former association or claimant employee or contractor or contractor's employee;
 - (2) is related within a degree of relationship described by Government Code §573.002 to:
 - (A) a former association employee;
 - (B) a former association contractor or contractor's employee;
 - (C) a former claimant employee; or
 - (D) a former claimant contractor or contractor's employee;
 - (3) is a current association policyholder;
 - (4) previously filed a claim with the association;
 - (5) is a current employee or contractor of an insurance company or public insurance adjusting company; or
 - (6) was a party or represented a party to a lawsuit with the association within the previous five years.
- (d) Disqualifying conflicts. A potential umpire has a disqualifying conflict of interest if the potential umpire:
- (1) is a current association or claimant employee;
 - (2) is a current association or claimant contractor, or contractor's employee, except that it is not a conflict for the umpire to be a contractor solely to work on the pending appraisal;
 - (3) is related within a degree of relationship described by Government Code §573.002 to:

- (A) a current association employee;
 - (B) a current association contractor or contractor's employee;
 - (C) the claimant or a representative of the claimant;
 - (D) a current claimant employee; or
 - (E) a current claimant contractor or contractor's employee;
- (4) currently has an open claim, or acts as a representative or public adjuster on an open claim with the association;
- (5) is a party to or represents a party to a current lawsuit with the association;
- (6) adjusted the loss or acted as a public adjuster on the loss involved in the claim;
- (7) is related to the adjuster or public adjuster who adjusted the loss;
- (8) is an employee of the adjusting company or public insurance adjusting company that adjusted the loss or represented the claimant on the loss; or
- (9) has any other direct or indirect interest, financial or otherwise, of any nature that substantially conflicts with the umpire's duties.

§5.4215. Appraisal Process – Umpire Roster.

(a) Eligibility. To be placed on the umpire roster, a person must register with the department and must meet the qualifications in §5.4214 of this title (relating to Appraisal Process – Umpire Qualifications and Conflicts of Interest).

(b) Registration. The registration must include contact information and details about:

- (1) the person's training and experience related to building construction, repair, estimating, or investigating property damage;
- (2) any training and experience related to estimating property damage claims;
- (3) whether the person's experience is with residential or commercial property damage;
- (4) any relevant licenses or certifications;
- (5) a general description of the approximate number, type of policies, and value and complexity of property damage claims on which the applicant worked over the previous three years;
- (6) the counties in which the person is willing to work;
- (7) the type of policies, and value and complexity of claims on which the person is willing to work;
- (8) potential conflicts of interest under §5.4214 of this title;
- (9) any professional disciplinary actions or criminal convictions; and
- (10) an up-to-date biography, resume, or curriculum vitae.

(c) Notice. A person is not on the umpire roster until the department sends written notice of placement on the roster.

(d) Limited number. The department may limit the number of umpires on the roster.

(e) Publication. The department will publish the umpire roster on the department's website. Published roster information will include an umpire's name, contact information, preferred types of claims, and preferred geographic areas.

(f) Disqualifying conflicts. The umpire must notify the department of a disqualifying conflict of interest under §5.4214 of this title within 10 days of learning about the conflict.

(g) Term. An umpire will be on the umpire roster for a term of three years, except as provided under §5.4216 of this title (relating to Appraisal Process – Removal of Umpire from Roster). To remain on the roster for additional terms, an umpire must submit a new registration to the department.

(h) Submissions. Notices and registrations sent to the department under this section must comply with §5.4251 of this title (relating to Requests and Submissions to the Department).

§5.4216. Appraisal Process – Removal of Umpire from Roster.

(a) Voluntary removal. An umpire may request removal from the roster at any time. The umpire must submit the request under §5.4251 of this title (relating to Requests and Submissions to the Department).

(b) Removal by department. The department may, in its sole discretion, remove an umpire from the umpire roster for:

- (1) alleged dishonest, incompetent, fraudulent, or unethical behavior;
- (2) alleged failure to respond promptly and completely to requests from the department and where the actions or failure to act are counter to the purpose of the appraisal;
- (3) a disciplinary action by any other agency or disciplinary authority against the umpire, regardless of whether the agency or disciplinary authority's regulation relates to the appraisal;
- (4) conviction of, or accepting deferred adjudication for, a crime under state or federal law;
- (5) a disqualifying conflict of interest listed in §5.4214 of this title (relating to Appraisal Process – Umpire Qualifications and Conflicts of Interest);
- (6) failure to comply with any requirement of this title; or
- (7) other factors relevant to the umpire's qualifications, conflicts of interest, or performance.

§5.4217. Appraisal Process – Umpire Selection by Department.

(a) Applicability. This section applies when the appraisers are unable to agree on an umpire and a party requests the department to select an umpire.

(b) Notice. The department will notify at least five umpires of possible inclusion on an umpire selection panel.

(c) Factors. When selecting an umpire for the umpire selection panel, the department may consider:

- (1) the umpire's preferred geographic locations and types of claims;
- (2) the proximity of the claimant and the umpire;
- (3) the umpire's areas of training and expertise;
- (4) the extent of the umpire's experience with appraisal and with property damage claims;

- (5) the subject of the dispute;
- (6) the type of policy;
- (7) the value and complexity of the claim;
- (8) any conflicts of interest; and
- (9) other factors relevant to the dispute.

(d) Umpire's response. Each umpire notified under subsection (b) of this section must respond to the department no later than the fifth day after receiving the notice.

(1) The umpire's response must state whether the umpire will accept or reject selection as umpire for the appraisal; and

(2) provide:

(A) an up-to-date resume, curriculum vitae, or brief biographical sketch of the umpire;

(B) a statement of whether the umpire is insured by the association;

(C) a description of the nature and extent of any prior knowledge the umpire has of the dispute;

(D) a description of any contacts with either party, including association employees, within the previous three years;

(E) a description of other known potential conflicts of interest listed in §5.4214 of this title (relating to Appraisal Process – Umpire Qualifications and Conflicts of Interest); and

(F) any new disqualifying conflicts of interest listed in §5.4214 of this title.

(e) Umpire selection panel. From the information provided, the department will determine which umpires will be on the umpire selection panel. The department will send the umpire selection panel to each party and each appraiser, along with the information the listed umpires provided.

(f) Selection by agreement. The appraisers may select an umpire from the umpire selection panel. If the appraisers agree on an umpire, the association must inform the department no later than the third day after the agreement.

(g) Selection if the appraisers fail to agree. If the appraisers are unable to agree on an umpire from the umpire selection panel:

(1) each appraiser or party may object to umpires on the umpire selection panel under §5.4252(a)(1)(A) and (2)(A) of this title (relating to Objections); and

(2) the department will select an umpire from the umpires on the umpire selection panel that neither appraiser has objected to.

(h) Notice. The department will notify the umpire selected under subsection (f) or (g) of this section and give the umpire the claim information provided under §5.4211 of this title (relating to Appraisal Process).

§5.4218. Appraisal Process – Umpire Obligations.

(a) Conflicts. An umpire must disclose to both parties any potential conflicts of interest. Conflicts of interest are listed in §5.4214 of this title (relating to Appraisal Process – Umpire Qualifications and Conflicts of Interest). The umpire must disclose the conflicts of interest no

later than the fifth day after being hired, and before the umpire begins work. A person may not serve as umpire in an appraisal for which the person has a disqualifying conflict of interest.

(b) Work. The umpire may begin work only if the association's appraiser and the claimant's appraiser fail to reach an agreement on the appraisal amount and tell the umpire in writing to begin work.

(c) Review information. The parties and appraisers may request the umpire to review any information related to the claim, including itemized estimates and supporting documents, such as photographs and diagrams. The umpire must review in detail all information the appraisers and parties submit related to the dispute, including the itemized appraisals. At a party's request, the umpire may also consider any conflicts of interest or objections to appraisers. The umpire must allow each appraiser a fair opportunity to present evidence and argument. The umpire may ask questions and request documents or other evidence, including expert reports.

(d) Limited scope. The umpire's work may only cover items about which the two appraisers disagree. The umpire must review the differences and seek agreement with one or both appraisers regarding the disputed items. The umpire may accept either appraiser's scope, quantities, values, or costs on items in dispute or may develop an independent decision on an item. The umpire may not visit the claimant's property without agreement from both appraisers.

(e) Decision. An itemized decision agreed to by both appraisers or by one appraiser and the umpire is binding on the parties as to the amount of loss the association will pay for the claim. The umpire may enter into an itemized decision with one or both appraisers on a compromise basis. The umpire can issue a decision if agreement is reached on the final total, even if there is disagreement on some of the individual items. The umpire must promptly give the parties and the appraisers an itemized written decision.

(f) Ethics. After accepting the responsibility to be the umpire for an appraisal, the umpire:

(1) may not withdraw or abandon the appraisal unless compelled to do so by unanticipated circumstances that would render it impossible or impractical to continue;

(2) may not be present or participate in settlement discussions unless requested by both parties; and

(3) must decide all matters fairly, exercising independent judgment and utmost integrity. An umpire may not permit outside pressure to affect the appraisal and may not delegate the umpire's decision under subsection (e) of this section to any other person.

(g) Fees. The umpire must disclose all fees and must state whether the umpire charges for a minimum number of hours. The umpire may specify different charges for different types or values of claims. The parties may not pay the umpire on a contingent fee basis, percentage of the decision, barter arrangement, gift, favor, or in-kind exchange. This subsection does not apply to department-selected umpires under §5.4217 of this title (relating to Appraisal Process – Umpire Selection by Department).

§5.4219. Appraisal Process – Additional Obligations for Department-Selected Umpires.

(a) Applicability. The following umpire obligations apply only when the department selects an umpire under §5.4217 of this title (relating to Appraisal Process – Umpire Selection by Department).

(b) Notices. No later than the seventh day after receiving notice of being selected for an appraisal, the umpire must send a notice to the parties and to the appraisers. This deadline may not be extended. The notice must:

- (1) be in writing;
- (2) inform the parties and appraisers that the umpire has been selected;
- (3) state whether the umpire is insured by the association; and
- (4) inform the parties of their right to object to the umpire under §5.4252 of this

title (relating to Objections).

(c) Contract. Before the umpire begins work, the parties and the selected umpire must sign an appraisal contract. The contract must require:

- (1) the parties and the umpire to comply with the sections of this division related to appraisal; and
- (2) each party to pay one-half of all appraisal costs described in §5.4221 of this title (relating to Appraisal Process – Costs).

(d) Disposition. The umpire must notify the department when the appraisal process is complete and of the appraisal decision.

(e) Fees. The umpire must charge an hourly rate of \$150 and may charge a two-hour minimum fee.

(1) The parties may not pay an umpire on a contingent fee basis, percentage of the decision, barter arrangement, gift, favor, or in-kind exchange.

(2) The umpire may charge for reasonable incurred travel costs, including mileage, meals, and lodging, according to the travel regulations adopted by the Texas Comptroller of Public Accounts under Government Code §660.021. The umpire must provide an estimate of travel costs as an addendum to the contract under subsection (c) of this section.

§5.4220. Appraisal Process – Prohibited Communications.

(a) Ex parte communications. After an umpire is selected and before the appraisal is completely resolved:

(1) The umpire may not communicate separately with either party or either party's appraiser regarding the pending appraisal unless the umpire notifies the other party and gives the other party the opportunity to participate.

(2) No party or appraiser may communicate with the umpire regarding the pending appraisal without including the other party or appraiser, except that:

(A) an appraiser may identify the parties' counsel or experts;

(B) an appraiser may discuss logistical matters, such as setting the time and place of meetings or making other arrangements for the conduct of the proceedings. The appraiser initiating this contact with the umpire must promptly inform the other appraiser; or

(C) if an appraiser fails to attend a meeting or conference call after receiving notice, or if both parties agree in writing, the opposing appraiser may discuss the claim with the umpire who is present.

(b) Confidentiality. After an umpire is notified that the umpire may be on an umpire selection panel, the umpire may not at any time communicate any information about the appraisal with anyone besides the parties, the association, the appraisers, and the department. However, the umpire may communicate information about the appraisal with the written consent of the parties.

§5.4221. Appraisal Process – Costs.

(a) One-half per party. Each party must pay one-half of all reasonable and necessary costs incurred or charged in connection with the appraisal, including:

- (1) appraisers' fees;
- (2) umpire's fee; and
- (3) umpire's travel costs.

(b) No umpire fee before work begins. If the parties settle before the umpire begins work, the umpire may not charge a fee.

(c) Department not responsible. The department is not responsible for any appraisal costs.

§5.4222. Appraisal Process – Extensions of Deadlines.

(a) Extensions. For good cause, the commissioner may extend any deadline in this division related to appraisal, except the deadline for the umpire to notify the parties that the umpire is insured by the association, under §5.4218 of this title (relating to Appraisal Process – Umpire Obligations).

(b) Request for extension. To request the commissioner to extend a deadline, a party, appraiser, or umpire must send the request in writing to the department, under §5.4251 of this title (relating to Requests and Submissions to the Department). The request must explain the good cause for the extension. Good cause includes military deployment of the claimant.

(c) Extension limit. Deadline extensions may not exceed an aggregate of 120 days. This limit does not apply to extensions of the deadline to file an objection because an umpire is insured by the association.

§5.4231. Mediation Process.

(a) Applicability. Sections 5.4231 – 5.4241 of this title are the mediation process and apply when:

- (1) the association has denied coverage for a claim, in full or in part;
- (2) the claimant disputes the denial and gives the association a notice of intent to file suit; and
- (3) the association has requested mediation under the association policy within the time frame allowed under Insurance Code §2210.575.

(b) Mediation explanation. At the same time the association requests mediation, the association must give the claimant a notice explaining the mediation process.

(c) Mediator selection. The association and the claimant must select a mediator who is qualified under §5.4232 of this title (relating to Mediation Process – Mediator Qualifications and Conflicts of Interest). If the parties are unable to agree on a mediator, either party may request the department to select a mediator. The party must submit the request under §5.4251 of this title (relating to Requests and Submissions to the Department), and must include the following information:

- (1) the type of policy;
- (2) a description of the claim and, if known, the potential claim amount;
- (3) the association's denial letter;
- (4) the policyholder's notice of intention to file suit; and
- (5) any other relevant information that the department requests.

(d) Representation. The parties may participate in the mediation without an attorney. Both parties must bring a person who is authorized to settle the case. An attorney representing the association may not attend the mediation unless an attorney representing the claimant participates.

(e) Review information. The parties may ask the mediator to review any information related to the claim, including itemized estimates and supporting documents, such as photographs and diagrams.

(f) Rules of evidence. The rules of evidence do not apply to mediation.

(g) Confidentiality. Unless the parties agree otherwise, all information revealed in the mediation is part of confidential settlement negotiations in anticipation of litigation. This includes any documents presented or created during the mediation.

(1) No one may make audio or visual recordings of the mediation.

(2) Parties must give any notes, other than a signed agreement between the parties made during the mediation, to the mediator to be destroyed.

(3) This rule does not affect the discoverability or admissibility of documents that are otherwise discoverable or admissible.

(h) Agreement. If the parties reach an agreement in mediation, they must put the agreement in writing. Both parties must sign the agreement.

(1) The agreement may include parts of the claim for which the association accepts coverage.

(2) The agreement may be a partial agreement resolving some parts of the dispute but not others.

(3) A mediation agreement does not affect rights on claims for damages that were undetected at the time of the agreement.

§5.4232. Mediation Process – Mediator Qualifications and Conflicts of Interest.

(a) Required qualifications. To qualify as a mediator, a person must:

- (1) have completed a 40-hour basic mediation course:

(A) conducted by an alternative dispute resolution system described in Texas Civil Practice and Remedies Code §154.021(a)(1); or

(B) that complies with the mediation training standards established by the Texas Mediation Trainers Roundtable; and

(2) not have any disqualifying conflicts of interest listed in subsection (d) of this section.

(b) Preferred qualifications. The following qualifications are preferred:

(1) has conducted at least three mediations in the previous 12 months; and

(2) has experience mediating property damage claims.

(c) Potential conflicts. A potential conflict of interest exists when a mediator:

(1) is a former association or claimant employee;

(2) is a former association or claimant contractor or contractor's employee;

(3) is related within a degree of relationship described by Government Code

§573.002 to:

(A) a former association employee;

(B) a former association contractor or contractor's employee;

(C) a former claimant employee; or

(D) a former claimant contractor or contractor's employee;

(4) is a current association policyholder;

(5) previously filed a claim with the association;

(6) is a current employee or contractor of an insurance company or public insurance adjusting company; or

(7) was a party or represented a party to a lawsuit with the association within the previous five years.

(d) Disqualifying conflicts. A potential mediator has a disqualifying conflict of interest if the mediator:

(1) is a current association or claimant employee, contractor, or contractor's employee, except that it is not a conflict for the mediator to be a contractor solely to serve as mediator for the pending mediation;

(2) is related within a degree of relationship described by Government Code

§573.002 to:

(A) a current association employee;

(B) a current association contractor or contractor's employee;

(C) the claimant or a representative of the claimant;

(D) a current claimant employee; or

(E) a current claimant contractor or contractor's employee;

(3) currently has an open claim, or acts as a representative or public adjuster on an open claim with the association;

(4) is a party to or represents a party to a current lawsuit with the association;

(5) adjusted the loss or acted as a public adjuster on the loss involved in the claim, is related to the adjuster or public adjuster who adjusted the loss, or is an employee of

the adjusting company or public insurance adjusting company that adjusted the loss or represented the claimant on the loss; or

(6) has any other direct or indirect interest, financial or otherwise, of any nature that substantially conflicts with the mediator's duties.

§5.4233. Mediation Process – Mediator Roster.

(a) Eligibility. To be placed on the mediator roster, a mediator must register with the department and must meet the qualifications in §5.4232 of this title (relating to Mediation Process – Mediator Qualifications and Conflicts of Interest).

(b) Registration. The registration must include contact information and details about:

- (1) the mediator's mediation training;
- (2) any mediation certification;
- (3) any other relevant licenses or certifications;
- (4) any training or experience relating to property damage claims;
- (5) a general description of the approximate number, value, complexity, and nature of disputes mediated over the previous three years;
- (6) the counties in which the mediator is willing to mediate;
- (7) the types of policies, and value and complexity of claims the mediator is willing to mediate;

- (8) potential conflicts of interest, under §5.4232 of this title;
- (9) any professional disciplinary actions or criminal convictions;
- (10) whether the mediator is insured by the association; and
- (11) an up-to-date biography, resume, or curriculum vitae.

(c) Notice. A person is not on the mediator roster until the department sends written notice of placement on the roster.

(d) Limited number. The department may limit the number of mediators on the roster.

(e) Publication. The department will publish the mediator roster on the department's website. Published roster information will include a mediator's name, contact information, preferred types of claims, and preferred geographic areas.

(f) Disqualifying conflicts. The mediator must notify the department of a disqualifying conflict of interest, under §5.4232 of this title.

(g) Term. A mediator will be on the mediator roster for a term of three years, except as provided under §5.4234 of this title (relating to Mediation Process – Removal of Mediator from Roster). To remain on the roster for additional terms, a mediator must submit a new registration to the department.

(h) Submissions. Notices and registrations under this section must comply with §5.4251 of this title (relating to Requests and Submissions to the Department).

§5.4234. Mediation Process – Removal of Mediator from Roster.

(a) Voluntary removal. A mediator may request removal from the roster at any time. The mediator must submit the request under §5.4251 of this title (relating to Requests and Submissions to the Department).

(b) Removal by department. The department may, in its sole discretion, remove a mediator from the mediator roster for:

- (1) alleged dishonest, incompetent, fraudulent, or unethical behavior;
- (2) alleged failure to respond promptly and completely to requests from the department and where the actions or failure to act are counter to the purpose of mediation;
- (3) a disciplinary action by any other agency or disciplinary authority against the mediator, regardless of whether the agency or disciplinary authority's regulation relates to mediation;
- (4) conviction of, or accepting deferred adjudication for, a crime under state or federal law;
- (5) a disqualifying conflict of interest listed in §5.4232 of this title (relating to Mediation Process – Mediator Qualifications and Conflicts of Interest);
- (6) failure to comply with any requirement of this title; or
- (7) other factors relevant to the mediator's qualifications, conflicts of interest, or performance.

§5.4235. Mediation Process – Mediator Selection by Department.

(a) Applicability. This section applies when the parties are unable to agree on a mediator and a party requests the department to select a mediator.

(b) Notice. The department will notify at least five mediators of possible inclusion on a mediator selection panel.

(c) Factors. When selecting a mediator for the mediator selection panel, the department may consider:

- (1) the mediator's preferred geographic locations and types of claims;
- (2) the proximity of the claimant and the mediator;
- (3) the mediator's areas of training and expertise;
- (4) the extent of the mediator's experience with mediation and with property damage claims;
- (5) the subject of the dispute;
- (6) the type of policy;
- (7) the value and complexity of the claim;
- (8) any conflicts of interest; and
- (9) other factors relevant to the dispute.

(d) Mediator's response. Each mediator notified under subsection (b) of this section must respond to the department no later than the fifth day after receiving the notice. The mediator's response must state whether the mediator will accept or reject selection as mediator for the mediation; and must provide:

- (1) an up-to-date resume, curriculum vitae, or brief biographical sketch of the mediator;
- (2) a statement of whether the mediator is insured by the association;
- (3) a description of the nature and extent of any prior knowledge the mediator has of the dispute;

(4) a description of any contacts with either party, including association employees, within the previous three years;

(5) a description of other known potential conflicts of interest. Potential conflicts of interest are listed in §5.4232 of this title (relating to Mediation Process – Mediator Qualifications and Conflicts of Interest); and

(6) any new disqualifying conflicts of interest listed in §5.4232 of this title.

(e) Mediator selection panel. From the information provided, the department will determine which mediators will be on the mediator selection panel. The department will send the mediator selection panel to each party, along with the information the listed mediators provided.

(f) Selection by agreement. The parties may select a mediator from the mediator selection panel. If the parties agree on a mediator, the association must inform the department no later than the third day after the agreement.

(g) Selection if the parties fail to agree. If the parties fail to agree on a mediator from the mediator selection panel:

(1) each party may object to mediators on the mediator selection panel under §5.4252(a)(1)(A) and (2)(A) of this title (relating to Objections); and

(2) the department will select a mediator from the mediators on the mediator selection panel that neither party has objected to.

(h) Notice. The department will notify the mediator selected under subsection (e) or (f) of this section and give the mediator the claim information provided under §5.4231 of this title (relating to Mediation Process).

§5.4236. Mediation Process – Mediator Obligations.

(a) Conflicts. A mediator must disclose to both parties any conflicts of interest. Conflicts of interest are listed in §5.4232 of this title (relating to Mediation Process – Mediator Qualifications and Conflicts of Interest). The mediator must disclose the conflicts of interest no later than the fifth day after being hired, and before the mediation begins. A mediator may not serve as mediator in a dispute for which the mediator has a disqualifying conflict of interest.

(b) Schedule mediation. The mediator must set the date, time, and place for the mediation. The mediator must work with the parties to set a time that is convenient for all. The mediator should set the length of the mediation based on the type of policy, and value and complexity of the dispute.

(c) Location. The mediator must hold the mediation in the county in which the property is located, or in another county to which the parties and mediator agree. The mediator must locate and arrange for a mediation facility.

(d) Notice to parties. The mediator must notify the parties in writing of the date, time, and place for the mediation as soon as possible, but no later than the 14th day before the mediation.

(e) Reschedule. The mediator must reschedule the mediation if either party asks, and the other party does not object. The mediator may reschedule for good cause, even if the other party objects. Good cause includes significant illness, injury, or other emergency that the

parties could not control and, for the association, could not reasonably be remedied before the mediation by providing a replacement representative or otherwise.

(f) Review information. The mediator must review all information that the parties submit.

(g) Conduct mediation. The mediator should encourage and assist the parties in reaching a settlement, but may not compel or coerce them. The mediator must give the parties an opportunity to present their sides of the dispute. The mediator must inform the parties of the strengths and weaknesses of their positions. The mediator may meet with the parties separately.

(h) Termination. The mediator may terminate the mediation if either party fails to negotiate in good faith. The mediator may also terminate the mediation for other reasons.

(i) Confidentiality. The mediator may not disclose to either party information given in confidence unless the disclosing party expressly authorizes disclosure in writing. The mediator's activities are confidential and privileged. Unless required by other law, no one may call the mediator as a witness in any further proceedings regarding the claim.

(j) Agreement. If the parties agree to settle the dispute, the mediator must ensure that the parties sign a written agreement.

(k) Mediator ethics. A mediator must comply with the Ethical Guidelines for Mediators adopted by the Texas Supreme Court on June 13, 2005, in Miscellaneous Docket No. 05-9107, amended April 11, 2011, in Miscellaneous Docket 11-9062.

(l) Fees. The mediator must disclose all fees and must state whether the mediator charges for a minimum number of hours. The mediator may specify different charges for different types or values of claims. This subsection does not apply to department-selected mediators under §5.4235 of this title (relating to Mediation Process – Mediator Selection by Department).

§5.4237. Mediation Process. Additional Obligations for Department-Selected Mediators.

(a) Applicability. The following mediator obligations apply when the department selects a mediator, under §5.4235 of this title (relating to Mediation Process – Mediator Selection by Department).

(b) Notices. No later than the seventh day after receiving notice of selection to mediate a dispute, the mediator must send a notice to the parties. This deadline may not be extended. The notice must:

- (1) be in writing;
- (2) inform the parties that the mediator has been selected;
- (3) state whether the mediator is insured by the association; and
- (4) inform the parties of their right to object to the mediator under §5.4235 and §5.4252 of this title (relating to Objections).

(c) Disposition. The mediator must notify the department when the mediation is complete, whether or not the parties have reached an agreement.

(d) Contract. Before the mediation, the parties and the selected mediator must sign a mediation contract. The contract must require:

- (1) the parties and the mediator to comply with this division; and

(2) each party to pay one-half of all costs of mediation described in §5.4240 of this title (relating to Mediation Process – Costs).

(e) Fees. The mediator must charge an hourly rate of \$150 and may charge a four-hour minimum fee. The mediator may charge for reasonable incurred travel costs, including mileage, meals, and lodging, according to the travel regulations adopted by the Texas Comptroller of Public Accounts under Government Code §660.021. The mediator must provide an estimate of travel costs as an addendum to the contract under subsection (d) of this section.

§5.4238. Mediation Process – Association Obligations.

(a) Mediation explanation. At the same time the association requests mediation, the association must give the claimant a notice explaining the mediation process.

(b) Representative. The association must send an authorized representative to participate in the mediation. The association's representative must know the facts of the dispute and must be authorized to make an agreement to resolve the claim. The association must come prepared to present any relevant documents, such as insurance policies, payment receipts, adjuster reports, repair estimates, claim files, or other documents.

(c) Assistance. In addition to its primary representative, the association may bring other people to the mediation to help the primary representative. This may include contractors, adjusters, engineers, and interpreters.

(d) Association participants. No later than the seventh day before the mediation, the association must tell the claimant who will be attending the mediation for the association. The association may be represented by an attorney in the mediation only if the claimant is represented by an attorney.

(e) Rescheduling or canceling. No later than 24 hours before the scheduled mediation, the association must tell the mediator if the association wants to cancel or reschedule the mediation.

(f) Failure to appear.

(1) If the association has good cause for a failure to appear, the mediator may reschedule one time. Rescheduling does not relieve the association from the obligation to pay the rescheduling fee.

(2) The association will be deemed to have failed to appear if the association's representative lacks authority to settle the full amount of the claim or lacks the ability to disburse the settlement amount within a reasonable time following the mediation.

(g) Contract. If the department selects the mediator, then before mediation begins, the association must sign the mediation contract under §5.4237 of this title (relating to Mediation Process – Additional Obligations for Department-Selected Mediators).

(h) Good faith. The association must negotiate in good faith to attempt to resolve the dispute. However, there is no requirement that the dispute be resolved in mediation.

§5.4239. Mediation Process – Claimant Obligations and Privileges.

(a) Participation. The claimant must participate in the mediation. A claimant who participates in mediation must know the facts of the dispute and must be authorized to make an

agreement to resolve the claim. The claimant must come prepared to present any relevant documents, such as insurance policies, payment receipts, adjuster reports, repair estimates, claim files, or other documents.

(b) Assistance. The claimant may bring other people to help in presenting the claim. This may include contractors, adjusters, engineers, and interpreters.

(c) Attorney. The claimant may, but is not required to, be represented by an attorney in the mediation.

(d) Claimant participants. No later than the seventh day before the mediation, the claimant must tell the association if the claimant's attorney will be participating in the mediation. At the same time, the claimant must also tell the association who else will be attending the mediation with the claimant.

(e) Rescheduling. No later than 24 hours before the scheduled mediation, the claimant must tell the mediator if the claimant wants to reschedule the mediation.

(f) Failure to appear. If the claimant fails to appear for a scheduled mediation for which the association appears, but the claimant has good cause for a failure to appear, the mediator may reschedule one time. Rescheduling does not relieve the claimant from the obligation to pay the rescheduling fee.

(g) Contract. If the department selects the mediator, then before mediation begins, the claimant must sign the mediation contract under §5.4237 of this title (relating to Mediation Process – Additional Obligations for Department-Selected Mediators).

(h) Good faith. The claimant must negotiate in good faith to attempt to resolve the dispute. However, there is no requirement that the dispute must be resolved in mediation.

(i) Rescission. The claimant has three days from the date of an agreement to rescind the mediation agreement if the claimant has not accepted payment from the association by:

- (1) cashing or depositing any check or payment; or
- (2) agreeing in writing to accept an electronic funds transfer.

(j) Release. If the claimant does not rescind the settlement, it acts as a release of the association's liability on the claim, limited to the specific issues presented at the mediation. If an attorney representing the claimant is present at the mediation and the attorney signs the agreement, the agreement is immediately effective and may not be rescinded.

§5.4240. Mediation Process – Costs.

(a) One-half per party. Each party must pay one-half of all reasonable and necessary costs incurred or charged in connection with the mediation, including:

- (1) mediator's fee;
- (2) mediator's travel costs;
- (3) cost of renting space for the mediation; and
- (4) food or beverages provided during the mediation.

(b) Mediator fee if pre-mediation settlement. If the parties settle before mediation, the mediator may charge a reasonable fee for time already spent on preparation.

(c) Rescheduling fee. A party must pay the mediator a \$50 rescheduling fee if the party cancels or fails to attend the mediation with less than 24 hours notice to the mediator before the mediation. This is in addition to any fee for the actual mediation.

(d) Failure to appear. If the association fails to appear for a scheduled mediation for which the claimant appears, the association must pay the claimant for any actual costs incurred in attending the mediation plus the value of lost wages.

(e) Payment from proceeds of claim. If the claimant fails to pay any amount owed for the mediation, the association may pay the amount owed out of any proceeds the association owes the claimant.

(f) Department not responsible. The department is not responsible for any mediation costs.

§5.4241. Mediation Process – Deadlines and Extensions.

(a) Deadline. Mediation must be completed by the 60th day after the association notifies the claimant that the association is requesting mediation, unless the deadline is extended. If the association does not ask the department to select a mediator before the 60-day deadline, or any extension of that deadline, the association waives its right to require mediation under Insurance Code §2210.575 and this division.

(b) Extensions.

(1) The association and the claimant may agree to extend the 60-day deadline for mediation in subsection (a) of this section.

(2) If the commissioner extends the 60-day deadline in subsection (a) of this section, the extension must comply with the 120-day limit in Insurance Code §2210.581(b).

(3) For good cause, the commissioner may extend any deadline in this division related to mediation, except the deadline for the mediator to notify the parties that the mediator is insured by the association, under §5.4236 of this title (relating to Mediation Process – Mediator Obligations), may not be extended.

(c) Lawsuit. If mediation is not complete by the 60-day deadline or an extension, the claimant may file suit.

(d) Request for extension. To request the commissioner to extend a deadline, a party or mediator must send the request in writing to the department, under §5.4251 of this title (relating to Requests and Submissions to the Department). The request must explain the good cause for the extension. Good cause includes military deployment of the claimant.

(e) Extension limit. For claims filed during a particular catastrophe year, deadline extensions by the commissioner may not exceed an aggregate of 120 days. This limit does not apply to extensions of the deadline to file an objection because a mediator is insured by the association.

§5.4251. Requests and Submissions to the Department.

(a) Items submitted under this section must be submitted in writing to the chief clerk, Texas Department of Insurance. They may be:

(1) hand delivered;

- (2) mailed; or
- (3) sent in a manner that is otherwise acceptable to the department.
- (b) The date of the item will be the date the department receives the item.
- (c) When a party submits a request to the commissioner or the department under this section, the party must provide a copy of the request to the other party at the same time.

§5.4252. Objections.

- (a) Objections. A party or appraiser may object to an umpire or a mediator as follows:
 - (1) for good cause:
 - (A) no later than the third day after the party or appraiser receives the selection panel, based on the information provided with the selection panel, or based on other information not provided with the selection panel that is known to the party or the appraiser at the time the selection panel is received; and
 - (B) at any time no later than 30 days after the mediation or appraisal is complete based on other information not provided with the selection panel and discovered after the selection of the umpire or mediator; or
 - (2) because the umpire or mediator is insured by the association no later than the earlier of:
 - (A) the seventh day after receiving the selection panel and the information provided with it; or
 - (B) the seventh day before the mediator or umpire begins work.
- (b) Details for objections for good cause. A party or appraiser may object for good cause based on information the department provides with a selection panel or based on other information. Good cause for an objection includes:
 - (1) any conflict of interest listed in §§5.4212, 5.4214, or 5.4232 of this title (relating to Appraisal Process – Appraiser Qualifications and Conflicts of Interest, Appraisal Process – Umpire Qualifications and Conflicts of Interest, or Mediation Process – Mediator Qualifications and Conflicts of Interest, respectively);
 - (2) a mediator or an umpire who lacks independence or is unable to competently or promptly handle the duties of a mediator or an umpire; or
 - (3) other reasons that would reasonably be expected to impair the mediation or appraisal.
- (c) How to submit objections. All objections must be sent to the department under §5.4251 of this title (relating to Requests and Submissions to the Department). An objection must include the following information:
 - (1) names of the parties involved in the dispute;
 - (2) name of the person submitting the objection;
 - (3) the association claim number;
 - (4) name of the mediator or umpire that the party or appraiser wants to object to;
 - (5) an explanation of the good cause for objecting to the mediator or umpire; and
 - (6) an explanation of any direct financial or personal interest that the mediator or umpire has in the outcome of the dispute.

(d) Replacement. If the commissioner determines that good cause exists to replace a mediator or an umpire who was selected for a dispute, the commissioner will select a replacement mediator or umpire.

§5.4253. Contract Administrator. The department may contract with one or more entities to administer the umpire roster, the mediator roster, or any of the department's or the commissioner's functions in this division.

Adopted by Commissioner's Order 2246
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