

**REVISED STANDARDS
OF CONDUCT
FOR
MEDIATORS**

**JOINT COMMITTEE DRAFT
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For Discussion Only

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PREFACE

The initiative for these Standards came from three professional groups: the American Arbitration Association, the American Bar Association (Section of Dispute Resolution)¹, and the Association for Conflict Resolution.

The purpose of the original initiative in the 1992-94 period was to establish a set of standards to serve as a general framework for the practice of mediation. The efforts to develop such standards reflected a continuous process of learning and development in the profession and the standards were designed to assist practitioners in it. The Model Standards of Conduct for Mediators are intended to perform three major functions: to serve as a guide for the conduct of mediators; to inform the mediating parties; and to promote public confidence in mediation as a process for resolving disputes. Further, while it is recognized that in some cases laws or contractual agreement may affect their application, the Standards are intended to apply to all types of mediation.

The Revised Model Standards of Conduct for Mediators sustain those guiding principles. They are intended to serve as a general framework for the practice of mediation and to promote the three major functions of guiding mediator conduct, informing the mediating parties, and promoting public confidence in mediation as a dispute resolution process. The Revised Standards of Conduct for Mediators retain the format and language of the Model Standards of Conduct for Mediators unless there was evidence that new developments in the practice of mediation or policies governing its use warranted adjustment or that the original language required correction, clarification or reorganization.

Both the Standards and Revised Standards are offered in the hope that they will continue to serve an educational function and provide assistance to individuals, organizations, and institutions involved in mediation.

Mediation is a process in which an impartial third party – a mediator – facilitates the resolution of a dispute by promoting voluntary agreement (or “self-determination”) by the parties to the dispute. A mediator facilitates communications, promotes understanding, focuses the parties on their interests, and seeks creative problem solving to enable the parties to reach their own agreement. These Standards give meaning to this definition of mediation.

¹ The views set out in this publication have not been considered by the American Bar Association House of Delegates and do not constitute the policy of the American Bar Association

STANDARD I. SELF-DETERMINATION²

A mediator shall conduct a mediation as to both process and outcome based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes a free and informed choice to agree or not agree.³

COMMENTS:

1. Parties can exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in the process, and outcomes. The mediator is responsible for supporting party self-determination in each area, tempered by a mediator's duty to conduct a quality process.⁴
2. Although party self-determination is a fundamental principle of mediation practice, a mediator may need to balance party self-determination with a duty to conduct a quality process. When resolving these potentially conflicting duties, a mediator needs to be cautious of conflict of interest issues and avoid influencing party decisions for reasons such as higher settlement rates, egos, increased fees and outside pressures from individuals or organizations.⁵
3. A mediator cannot personally ensure that each party has made a fully informed choice to reach a particular agreement, but it is good practice for the mediator to make the parties aware of the importance of consulting other professionals, where appropriate, to help them make informed choices.

² Where appropriate, the statement of the Standard and the Comments are enumerated in separately identified paragraphs in order to facilitate indexing. The Joint Committee does not intend these alphabetical or numerical enumerations to reflect the relative priority of the respective statements.

³ Practitioners and scholars cite self-determination as the fundamental principle of mediation. Comments for Standard I, however, identify how this principle might conflict with other Standards and suggest that a mediator's duty, in limited circumstances, may override this principle.

⁴ Parties can exercise self-determination with regard to mediator selection. *See Standard III: Conflicts of Interest* and *Standard IV: Competence*. Parties can exercise self-determination with regard to process; for instance, the parties may work with the mediator(s) to design a mediation process specific to the needs of the parties or to design a comprehensive conflict resolution approach that includes mediation and other conflict resolution processes. *See Standard V: Confidentiality* and *Standard VI: Quality of the Process*. Parties can exercise self-determination with regard to participation in the mediation process. A mediator should inform the parties about any mandatory or good faith participation requirements imposed on the parties by an outside entity—such as a court—to ensure that the parties make an informed choice regarding participation. A mediator should recognize that parties exercise self-determination with regard to outcome of the mediation process; parties may choose to agree on some, all or none of their disputed issues.

⁵ To cite other examples illustrative of this potential conflict, a mediator should not: a) allow parties to design a process that is not mediation and then call it mediation simply to gain confidentiality protections; or b) proceed with a mediation when one of the parties obviously does not have the capacity to make free and informed decisions.

STANDARD II: IMPARTIALITY

A. A mediator shall conduct a mediation in an impartial manner and shall avoid conduct that gives the appearance of partiality toward or prejudice against a party. Impartiality means freedom from favoritism or prejudice in word, action or appearance.

B. A mediator shall mediate only those matters in which the mediator can remain impartial.

C. If at any time a mediator is unable to conduct the process in an impartial manner, the mediator shall withdraw.

D. In any mediation process, a mediator shall neither give nor accept a gift, favor, loan or other item of value that would raise a question as to the mediator's actual or perceived impartiality.⁶

COMMENTS:

1. A mediator should guard against acting on any partiality or prejudice based not only on a person's race, ethnicity, sex, religion, or national origin but also on a party's performance at the mediation.
2. While a mediator should recognize that cultural norms in some settings may make it appropriate for a mediator to accept ceremonial or token gifts prior to or at the conclusion of a mediation, a mediator should guard against accepting gifts that raise questions as to a mediator's actual or perceived impartiality.
3. A mediator may accept or give de minimis gifts or incidental items or services that are provided to facilitate the mediation so long as such practices do not raise questions as to a mediator's actual or perceived impartiality.

⁶ The concept of impartiality is central to the mediation process. The Reporter Notes for the Revised Standards references relevant scholarly discussion and party satisfaction studies that support the prominence accorded to this Principle.

STANDARD III. CONFLICTS OF INTEREST

A. A mediator shall avoid the appearance of a conflict of interest before, during and after a mediation. A conflict of interest is a dealing or relationship that might reasonably be seen as raising a question of the mediator's impartiality.⁷

B. Before accepting a mediation, a mediator shall make a reasonable inquiry to determine whether there are any facts that a reasonable individual would consider likely to create a potential or actual conflict of interest for a mediator. Thereafter, and as soon as practical, a mediator shall disclose all actual and potential conflicts of interest that are reasonably known to the mediator and could reasonably be seen as raising a question about a mediator's impartiality. If a mediator learns any fact described above after accepting a mediation, she or he shall disclose it as soon as is practical. If all parties agree to retain the mediator after disclosure, the mediator may proceed or continue with the mediation. However, if a conflict of interest casts serious doubt on the integrity of the process, the mediator shall withdraw or decline to proceed regardless of the express agreement of the parties.

C. During a mediation, a mediator shall not solicit or otherwise attempt to procure any future professional services, including future mediations.

D. Subsequent to mediation, a mediator shall not establish another relationship with one of the parties in any matter that would raise questions about the integrity of the mediation process.

COMMENTS:

1. The mediator's commitment must be to the parties and the process.
2. The mediator's duty to make a reasonable inquiry may be importantly shaped by the service context. For a complex case mediated by an attorney-mediator who is a member of a law firm, best practice consists of making a firm-wide conflicts check at the pre-mediation phase. By contrast, for a mediator of an interpersonal dispute administered by a community mediation agency who is charged with mediating the case immediately upon referral, making an inquiry of the parties and participants at the time of the mediation regarding potential conflicts of interest may be sufficient.

⁷ Given the central role that a mediator's impartiality assumes to promote the integrity and effectiveness of the mediation process (see Footnote 4 above), a mediator must avoid conduct that undermines the public or party perception of her or his impartiality. As stated in Standard III's remaining paragraphs, the duty to avoid conflicts of interest arises at the pre-mediation stage, during the mediation conference, and following the mediation conference. The basic approach to questions of conflicts of interest is consistent with the concept of self-determination set forth in Standard I.

3. Disclosure of relationships or circumstances which would create the potential for a conflict of interest rests on the mediator and should be made at the earliest possible opportunity and under circumstances which will allow the parties to freely exercise their right of self-determination as to both the selection of the mediator and participation in the mediation process.
4. Development of relationships by the mediator following the mediation with persons, organizations or agencies that might create a perceived or actual conflict of interest are importantly affected by considerations such as time elapsed following the mediation and the nature of the relationship established and services offered.⁸

⁸ For example, if one party to a mediation that had concluded the prior week offers the attorney-mediator of that case a full-time position as its General Counsel with employment to begin immediately, then important concerns about the perception of process integrity arise. By contrast, if a party to one mediation wants to use that mediator for future cases because it has been favorably impressed by that individual's skills and demeanor, then concerns about conflicts of interest do not immediately arise.

STANDARD IV: COMPETENCE

A. A mediator shall mediate only when the mediator has the necessary competence to satisfy the reasonable expectations of the parties.

B. If a mediator cannot satisfy this Standard, the mediator shall immediately notify the parties and take steps reasonably appropriate under the circumstances, including declining or withdrawing from the engagement or, where appropriate, obtaining assistance from others.

C. A mediator shall not conduct any aspect of a mediation while impaired by drugs, alcohol, medication or otherwise.

COMMENTS:

1. Any person may be selected as a mediator, provided that the parties are satisfied with the mediator's competence and qualifications. Training, experience in mediation, skills, cultural understandings, and other qualities are often necessary for effective mediation. A person who offers her or himself as available to serve as a mediator gives parties and the public the expectation that she or he has the competency to mediate effectively.
2. A mediator should have available for the parties information relevant to training, education and experience.
3. A mediator should attend educational programs and related activities to enhance and strengthen her or his personal knowledge of and skills in the mediation process.

STANDARD V: CONFIDENTIALITY

A. A mediator shall maintain the confidentiality of all information obtained by the mediator during a mediation, including information obtained from the parties, non-party participants or documents submitted to the mediator, unless otherwise agreed to by all the parties or otherwise required by law or public policy.

B. If the parties to a mediation agree that the mediator shall disclose information obtained during the mediation, the mediator may consider disclosing such information.⁹

COMMENTS:

1. The parties may make their own rules with respect to confidentiality, or the accepted practice of an individual mediator or institution may dictate a particular set of expectations. Depending on the circumstances of the mediation, the parties may have varying expectations regarding confidentiality, which should be addressed by the mediator. Where practicable, a mediator should reflect participant understanding in written form.
2. Unless otherwise required by law, a mediator who meets with a party in private session during a mediation should not convey directly or indirectly to any other party, group or institution any information that was obtained during that private session without the consent of the disclosing party.
3. In order to protect the integrity of a mediation, a mediator, unless required by law, should not communicate information about how the parties acted in the mediation process, the merits of the case, or settlement offers. A mediator may report, if required, whether parties appeared at a scheduled mediation and whether or not the parties reached an acceptable resolution.
4. Nothing in this Standard should be construed to prohibit monitoring, research, and evaluation of mediation activities or the continuing education of mediators.

⁹ One of the most significant developments surrounding the practice of mediation that has occurred since the adoption of the Model Standards of Conduct has been the development and passage of the Uniform Mediation Act (2003). That undertaking significantly enriched professional conversation and awareness of the policy goals advanced by a presumption that communications made for purposes of advancing a mediation conversation should not be available for use in subsequent proceedings. Discussion and debate surrounding that uniform law focus particularly on whether the parties and the mediator or just the parties should hold the privilege independently, and what exceptions to the privilege should be made a part of law. While this Standard is consistent with the policy goals of the Uniform Mediation Act, it is not designed to match its substantive provisions and nuances in every dimension

STANDARD VI: QUALITY OF THE PROCESS

A. A mediator shall sustain a quality mediation process by conducting the mediation in a manner that promotes diligence, timeliness, safety, presence of the appropriate participants, party participation, process fairness, party competency, and mutual respect among all participants.

B. A mediator shall terminate the mediation, withdraw from service, or take other appropriate steps if she or he believes that participant conduct, including that of the mediator, jeopardizes sustaining a quality mediation process.¹⁰

COMMENTS:

1. A mediator should conduct a mediation in a way that prevents one or more parties from manipulating the process to advance personal goals that are inconsistent with mediation principles and values.
2. A mediator should promote honesty and candor between and among all participants.
3. A mediator should agree to mediate only when she or he is prepared to commit the attention essential to an effective mediation.
4. A mediator should only accept cases when she or he can satisfy the reasonable expectation of the parties concerning the timing of the process. A mediator should not allow a mediation to be unduly delayed by the parties or their representatives.
5. Unless otherwise required by law, the presence or absence of persons at a mediation depends on the agreement of the parties and the mediator. The parties and mediator may agree that others may be excluded from particular sessions or from the entire mediation process.
6. The primary purpose of a mediator is to facilitate the parties' voluntary agreement. This role differs substantially from other professional client relationships. Mixing the role of a mediator and the role of a professional advising a client is problematic, and mediators should strive to distinguish between the roles. A mediator should therefore refrain from providing professional advice. Where appropriate, a mediator should recommend that parties seek outside professional advice, or consider resolving their

¹⁰ Challenges for mediators arise when a mediator learns, through meeting separately with the parties, that a settlement agreement all parties otherwise find acceptable in the exercise of their self-determination is predicated upon one party's failing to have disclosed to the other party material facts, such as substantial out-of-country assets that bear upon the agreed-upon distribution of common assets or a plan to file for bankruptcy, that would render the terms of the mediated agreement unfair or meaningless.

dispute through arbitration, counseling, neutral evaluation, or other processes.

7. A mediator who undertakes, at the request of the parties, an additional dispute resolution role in the same matter assumes increased responsibilities and obligations that may be governed by the standards of other professionals.
8. A mediator should postpone a session, withdraw from the mediation, or take other appropriate steps if a party is unable to participate due to a physical or mental disability or to drug or alcohol use.
9. A mediator should postpone a session, withdraw from the mediation, or take other appropriate steps if the mediator is made aware of evidence of domestic violence among the parties.
10. A mediator should postpone a session, withdraw from the mediation, or take other appropriate steps if the mediation is being used to further illegal conduct.

STANDARD VII: ADVERTISING AND SOLICITATION

A mediator shall be truthful and not misleading when advertising, soliciting or otherwise communicating one's qualifications, experience, and range of available professional services.

COMMENTS:

1. Communications, including business cards, letter heads, or computer-based communications, should not include any statistical settlement data or any promises as to outcome.¹¹
2. Communications may include references to a mediator's satisfying state, national or private organization qualifications only if the entity referred to has a procedure for qualifying mediators, and the mediator has been duly granted the requisite status.
3. A mediator should not solicit in a manner that could give an appearance of partiality for or against a party.
4. A mediator should not list names of clients or persons served in promotional materials and communications without their permission.

¹¹ Among other things, statistical settlement data is often out of date, and a mediator's use of such settlement data for purposes of marketing can lead to practices that are contrary to these Standards.

STANDARD VIII: FEES AND OTHER CHARGES

A mediator shall provide the parties or their counsel with true and complete information about mediation fees, expenses, and any other actual or potential charges that may be incurred in connection with the mediation.

COMMENTS:

1. If a mediator charges fees, the fees should be reasonable in light of all relevant factors, including the type and complexity of the matter, the qualifications of the mediator, the time required, and the rates which are customary for such mediation services.
2. A mediator's fee arrangement should be in writing unless the parties request otherwise.
3. A mediator who withdraws from a mediation should return any unearned fee, except for what may be covered by a minimum fee requirement.
4. While a mediator may accept payments in unequal amounts from the respective parties when they pay the mediator's service fee,¹² a mediator should be attentive to the potential impact, perceived or real, such a practice has on the mediator's impartiality and the integrity of the process.
5. A mediator should not enter into a fee agreement that is contingent upon the result of the mediation.
6. Except to cover administrative expenses and time spent, a mediator should not accept a fee for referral of a matter to another mediator or to any other person.

¹² There may be circumstances, such as a court-ordered dissolution of marriage mediation, in which the court sets the mediator's fee and apportions it according to the parties' ability to pay.

STANDARD IX: RESPONSIBILITIES TO THE MEDIATION PROFESSION

A mediator shall act in a manner that enhances the growth and quality of the mediation profession.¹³

COMMENTS:

A mediator, among other activities, should:

1. Foster diversity in the mediation field, reaching out to individuals with differing backgrounds and perspectives.
2. Strive to make mediation accessible to those who elect to use it, including providing services at a reduced rate or on a pro bono basis as appropriate.
3. Participate in research in the field when given the opportunity, including obtaining participant feedback when appropriate.
4. Participate in outreach and education efforts to assist the public in developing an improved understanding of, and appreciation for, mediation.
5. Assist newer mediators through training, mentoring and networking.
6. Exhibit tolerance of differing points of view within the field, seeking to learn from one another and work together to improve the profession and better serve people in conflict.

¹³ Any person offering mediation services under the provisions of the Revised Model Standards of Conduct for Mediators, whether for compensation or on a volunteer basis, is considered to be a member of the mediation profession.