A GUIDE FOR FEDERAL EMPLOYEE MEDIATORS

A SUPPLEMENT TO AND ANNOTATION OF THE
MODEL STANDARDS OF CONDUCT FOR MEDIATORS
ISSUED BY
THE AMERICAN ARBITRATION ASSOCIATION
THE AMERICAN BAR ASSOCIATION
AND
THE ASSOCIATION FOR CONFLICT RESOLUTION

FEDERAL INTERAGENCY ADR WORKING GROUP STEERING COMMITTEE

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The Model Standards of Conduct for Mediators
September 2005

The *Model Standards of Conduct for Mediators* was prepared in 1994 by the American Arbitration Association, the American Bar Association's Section of Dispute Resolution, and the Association for Conflict Resolution[1]. A joint committee consisting of representatives from the same successor organizations revised the Model Standards in 2005.[2] Both the original 1994 version and the 2005 revision have been approved by each participating organization.[3]

Preamble

Mediation is used to resolve a broad range of conflicts within a variety of settings. These Standards are designed to serve as fundamental ethical guidelines for persons mediating in all practice contexts. They serve three primary goals: to guide the conduct of mediators; to inform the mediating parties; and to promote public confidence in mediation as a process for resolving disputes.

Mediation is a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision making by the parties to the dispute.

Mediation serves various purposes, including providing the opportunity for parties to define and clarify issues, understand different perspectives, identify interests, explore and assess possible solutions, and reach mutually satisfactory agreements, when desired.

Note on Construction

These Standards are to be read and construed in their entirety. There is no priority significance attached to the sequence in which the Standards appear.

The use of the term "shall" in a Standard indicates that the mediator must follow the practice described. The use of the term "should" indicates that the practice described in the standard is highly desirable, but not required, and is to be departed from only for very strong reasons and requires careful use of judgment and discretion.

The use of the term "mediator" is understood to be inclusive so that it applies to co-mediator models.

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[1] The Association for Conflict Resolution is a merged organization of the Academy of Family Mediators, the Conflict Resolution Education Network and the Society of Professionals in Dispute Resolution (SPIDR). SPIDR was the third participating organization in the development of the 1994 Standards.

[2] Reporter's Notes, which are not part of these Standards and therefore have not been specifically approved by any of the organizations, provide commentary regarding these revisions.

[3] The 2005 revisions to the Model Standards were approved by the American Bar Association's House of Delegates on August 9, 2005, the Board of the Association for Conflict Resolution on August 22, 2005, and the Executive Committee of the American Arbitration Association on September 8, 2005.

These Standards do not include specific temporal parameters when referencing a mediation, and therefore, do not define the exact beginning or ending of a mediation.

Various aspects of a mediation, including some matters covered by these Standards, may also be affected by applicable law, court rules, regulations, other applicable professional rules, mediation rules to which the parties have agreed and other agreements of the parties. These sources may create conflicts with, and may take precedence over, these Standards. However, a mediator should make every effort to comply with the spirit and intent of these Standards in resolving such conflicts. This effort should include honoring all remaining Standards not in conflict with these other sources.

These Standards, unless and until adopted by a court or other regulatory authority, do not have the force of law. Nonetheless, the fact that these Standards have been adopted by the respective sponsoring entities should alert mediators to the fact that the Standards might be viewed as establishing a standard of care for mediators.

STANDARD I. SELF-DETERMINATION

A. A mediator shall conduct a mediation 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 free and informed choices as to process and outcome. Parties may exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes.

1. Although party self-determination for process design is a fundamental principle of mediation practice, a mediator may need to balance such party self-determination with a mediator's duty to conduct a quality process in accordance with these Standards.

2. A mediator cannot personally ensure that each party has made free and informed choices to reach particular decisions, but, where appropriate, a mediator should make the parties aware of the importance of consulting other professionals to help them make informed choices.

B. A mediator shall not undermine party self-determination by any party for reasons such as higher settlement rates, egos, increased fees, or outside pressures from court personnel, program administrators, provider organizations, the media or others.

Federal Guidance Notes:

1. If, in a federal employee mediator's informed judgment, an agreement desired by the parties will contravene federal law or regulation, the mediator should raise the issue for the parties to consider. If the parties cannot satisfy the mediator's concerns and nevertheless insist on executing such an agreement, the mediator should withdraw from the mediation immediately.

2. Certain federal agencies have instituted workplace mediation programs that require managers and supervisors to participate initially in mediation. These programs do not violate this self-determination standard, because the agency, as one of the parties, has elected voluntarily to participate in the mediation, with the manager or supervisor attending as the agency party's representative.

3. To the extent it does not interfere with the self-determination of the parties, and so long as the parties and sponsoring agency programs authorize the mediator to do so, a mediator may offer a party his or her evaluation of that party's position as a means of assisting the party realistically to assess the strength of its positions and the risks associated with proceeding with any litigation.

STANDARD II. IMPARTIALITY

A. A mediator shall decline a mediation if the mediator cannot conduct it in an impartial manner. Impartiality means freedom from favoritism, bias or prejudice.

B. A mediator shall conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality.

   1. A mediator should not act with partiality or prejudice based on a participant's personal characteristics, background, values and beliefs, or performance at a mediation, or any other reason.

   2. A mediator should neither give nor accept a gift, favor, loan or other item of value that raises a question as to the 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 a mediation or respect cultural norms so long as such practices do not raise questions as to a mediator's actual or perceived impartiality.

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

Federal Guidance Notes:

1. If a federal employee mediator determines he/she is unable to maintain and exhibit impartiality because of agency efforts to influence inappropriately the mediator's conduct or otherwise compromise the mediator's impartiality, the mediator should withdraw from the mediation.

2. Government ethics regulations prohibit the solicitation and receipt of gifts, and this includes gifts of travel. See, for example, 5 U.S.C. § 7353, 31 U.S.C § 1353, and 5 C.F.R. 2635 Subparts B and C. Executive branch regulations are posted on the Office of Government Ethics (OGE) website which, at the time of this publication, is www.usoge.gov. The term "gifts of travel" is not intended to include the parties' reimbursement to the mediator of travel costs incurred in conjunction with rendering of mediation services.

STANDARD III. CONFLICTS OF INTEREST

A. A mediator shall avoid a conflict of interest or the appearance of a conflict of interest during and after a mediation. A conflict of interest can arise from involvement by a mediator with the subject matter of the dispute or from any relationship between a mediator and any mediation participant, whether past or present, personal or professional, that reasonably raises a question of a mediator's impartiality.

B. 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. A mediator's actions necessary to accomplish a reasonable inquiry into potential conflicts of interest may vary based on practice context.

C. A mediator shall disclose, as soon as practicable, all actual and potential conflicts of interest that are reasonably known to the mediator and could reasonably be seen as raising a question about the mediator's impartiality. After disclosure, if all parties agree, the mediator may proceed with the mediation.

D. If a mediator learns any fact after accepting a mediation that raises a question with respect to that mediator's service creating a potential or actual conflict of interest, the mediator shall disclose it as quickly as practicable. After disclosure, if all parties agree, the mediator may proceed with the mediation.

E. If a mediator's conflict of interest might reasonably be viewed as undermining the integrity of the mediation, a mediator shall withdraw from or decline to proceed with the mediation regardless of the expressed desire or agreement of the parties to the contrary.

F. Subsequent to a mediation, a mediator shall not establish another relationship with any of the participants in any matter that would raise questions about the integrity of the mediation. When a mediator develops personal or professional relationships with parties, other individuals or organizations following a mediation in which they were involved, the mediator should consider factors such as time elapsed following the mediation, the nature of the relationships established, and services offered when determining whether the relationships might create a perceived or actual conflict of interest.

Federal Guidance Note: *The Administrative Dispute Resolution Act of 1996 ("ADR Act") (at 5 U.S.C. § 573(a)) requires federal employee mediators to disclose conflicts of interest in writing and this includes making sure that all parties to a mediation are aware of the precise nature of the mediator's relationship with any party. A federal employee mediator must limit his/her role to that of mediator and must never assume the role of advocate or advisor of any sort for any party's interests during the mediation process. Depending on the policies of their sponsoring program and the desires of the parties, federal employee mediators may offer evaluation of, for example, the strengths and weaknesses of positions, the value and cost of alternatives to settlement or the barriers to settlement (collectively referred to as evaluation) only if such evaluation does not interfere with the mediator's impartiality or the principle of self-determination of the parties. (See Federal Guidance Note 3 following Standard I, Self-Determination.) Under EEOC Management Directive MD-110, an EEO investigator or counselor may not serve as a mediator in an EEO case in which he/she has investigated or counseled the complainant. In addition, a mediator must not advise, counsel or represent any of the parties in any* ***future*** *proceeding concerning the subject matter of the dispute. A federal employee mediator must not serve as an advisor or approving official, for the purpose of approving a settlement agreement for statutory, regulatory or other legal compliance, when the mediator has mediated the dispute that is the subject of the settlement. Finally, mediators might also be subject to other statutes or regulations that prohibit their participation as a neutral regardless of disclosure.*

STANDARD IV. COMPETENCE

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

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 mediator competence. A person who offers to serve as a mediator creates the expectation that the person is competent to mediate effectively.

2. A mediator should attend educational programs and related activities to maintain and enhance the mediator's knowledge and skills related to mediation.

3. A mediator should have available for the parties' information relevant to the mediator's training, education, experience and approach to conducting a mediation.

B. If a mediator, during the course of a mediation determines that the mediator cannot conduct the mediation competently, the mediator shall discuss that determination with the parties as soon as is practicable and take appropriate steps to address the situation, including, but not limited to, withdrawing or requesting appropriate assistance.

C. If a mediator's ability to conduct a mediation is impaired by drugs, alcohol, medication or otherwise, the mediator shall not conduct the mediation.

STANDARD V. CONFIDENTIALITY

A. A mediator shall maintain the confidentiality of all information obtained by the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law.

1. If the parties to a mediation agree that the mediator may disclose information obtained during the mediation, the mediator may do so.

2. A mediator should not communicate to any non-participant information about how the parties acted in the mediation. A mediator may report, if required, whether parties appeared at a scheduled mediation and whether or not the parties reached a resolution.

3. If a mediator participates in teaching, research or evaluation of mediation, the mediator should protect the anonymity of the parties and abide by their reasonable expectations regarding confidentiality.

B. A mediator who meets with any persons in private session during a mediation shall not convey directly or indirectly to any other person, any information that was obtained during that private session without the consent of the disclosing person.

C. A mediator shall promote understanding among the parties of the extent to which the parties will maintain confidentiality of information they obtain in a mediation.

D. Depending on the circumstance of a mediation, the parties may have varying expectations regarding confidentiality that a mediator should address. 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.

Federal Guidance Notes:

1. Unless a specific statute controls, the confidentiality standards of the ADR Act, found at 5 U.S.C. § 574, will govern the confidentiality obligations in federal administrative mediations, and federal employee mediators should consider this statute to be the "applicable law" referenced in standard V.A. Similarly, for matters in United States district courts, mediators need to understand the confidentiality standards established by local rules of court required by the Alternative Dispute Resolution Act of 1998, at 28 U.S.C. 652(d). Mediators need to recognize that each district court is distinct, and that the rules in one district might differ significantly from the rules in another district.

2. These statutes do not afford absolute confidentiality protection. Federal employee mediators must refrain from unauthorized disclosure of "dispute resolution communications," as defined by the ADR Act, 5 U.S.C. 574(a). Federal employee mediators should consult their agency's guidance, as well as the ADR confidentiality guidance promulgated by the U.S. Attorney General's Federal ADR Council published at 65 Federal Register 83085 (December 29, 2000) and the IADRWG website (http://www.adr.gov). A joint committee of the ABA Dispute Resolution, Administrative Law, and Public Contract Law Sections has developed additional federal ADR confidentiality guidance. The IADRWG Steering Committee's Confidentiality Subcommittee also has issued a confidentiality guidance handbook for federal workplace mediation, which is available on the IADRWG website.

STANDARD VI. QUALITY OF THE PROCESS

A. A mediator shall conduct a mediation in accordance with these Standards and in a manner that promotes diligence, timeliness, safety, presence of the appropriate participants, party participation, procedural fairness, party competency and mutual respect among all participants.

1. A mediator should agree to mediate only when the mediator is prepared to commit the attention essential to an effective mediation.

2. A mediator should only accept cases when the mediator can satisfy the reasonable expectation of the parties concerning the timing of a mediation.

3. 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 all sessions.

4. A mediator should promote honesty and candor between and among all participants, and a mediator shall not knowingly misrepresent any material fact or circumstance in the course of a mediation.

5. The role of a mediator differs substantially from other professional roles. Mixing the role of a mediator and the role of another profession is problematic and thus, a mediator should distinguish between the roles. A mediator may provide information that the mediator is qualified by training or experience to provide, only if the mediator can do so consistent with these Standards.

6. A mediator shall not conduct a dispute resolution procedure other than mediation but label it mediation in an effort to gain the protection of rules, statutes, or other governing authorities pertaining to mediation.

7. A mediator may recommend, when appropriate, that parties consider resolving their dispute through arbitration, counseling, neutral evaluation or other processes.

8. A mediator shall not undertake an additional dispute resolution role in the same matter without the consent of the parties. Before providing such service, a mediator shall inform the parties of the implications of the change in process and obtain their consent to the change. A mediator who undertakes such role assumes different duties and responsibilities that may be governed by other standards.

9. If a mediation is being used to further criminal conduct, a mediator should take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.

10. If a party appears to have difficulty comprehending the process, issues, or settlement options, or difficulty participating in a mediation, the mediator should explore the circumstances and potential accommodations, modifications or adjustments that would make possible the party's capacity to comprehend, participate and exercise self-determination.

B. If a mediator is made aware of domestic abuse or violence among the parties, the mediator shall take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.

C. If a mediator believes that participant conduct, including that of the mediator, jeopardizes conducting a mediation consistent with these Standards, a mediator shall take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.

Federal Guidance Notes:

1. With respect to Standard VI.A.3, certain individuals may not be excluded from a federal mediation, if their attendance and/or participation is mandated by federal law. For example, the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7114(A)(2)(a), entitles a labor organization representing bargaining unit employees to be represented at any "formal discussion" between one or more representatives of an agency and one or more employees in the unit the union represents. This right has been interpreted by the Federal Labor Relations Authority and the U.S. Court of Appeals for the District of Columbia as applying to mediation of formal EEO complaints when the complainant is a bargaining unit employee. See, e.g., Dep't of the Air Force, 436th Airlift Wing, Dover AFB v. FLRA, 316 F.3d 280 (D.C. Cir. 2003); Luke Air Force Base, Ariz., 54 F.L.R.A. 716 (1998), rev'd, 208 F.3d 221 (9th Cir. 1999). Federal employee mediators should consult with the agency's ADR Program official, a Labor Relations Officer, labor counsel or other appropriate official when confronted with an issue of union attendance in a federal mediation pursuant to its "formal discussion" rights.

2. Federal employee mediators should not accept federal mediation assignments unless the assignment is under the auspices of an agency program, including an established multi-agency shared neutrals program, so as to avert the possibility of being charged with abuse of official time or otherwise putting at risk their rights and benefits as federal employees. Federal employee mediators are encouraged to contact their agency's mediation program administrator or Dispute Resolution Specialist for answers to specific questions related to these Standards, including questions involving potential conflicts of interest or abuse of government positions. If applicable, they may also wish to contact their respective agency's ethics officer to resolve particular questions, and/or other appropriate official to secure authorization to serve as mediators.

STANDARD VII. ADVERTISING AND SOLICITATION

A. A mediator shall be truthful and not misleading when advertising, soliciting or otherwise communicating the mediator's qualifications, experience, services and fees.

1. A mediator should not include any promises as to outcome in communications, including business cards, stationery, or computer-based communications.

2. A mediator should only claim to meet the mediator qualifications of a governmental entity or private organization if that entity or organization has a recognized procedure for qualifying mediators and it grants such status to the mediator.

B. A mediator shall not solicit in a manner that gives an appearance of partiality for or against a party or otherwise undermines the integrity of the process.

C. A mediator shall not communicate to others, in promotional materials or through other forms of communication, the names of persons served without their permission.

Federal Guidance Note: *For mediations subject to the ADR Act of 1996, mediators serve at the will of the parties. See 5 U.S.C. § 573(b). When federal employee mediators provide information regarding their experience and qualifications, they should provide meaningful and accurate information sufficient for the parties to make an informed decision to accept the mediator, whether that information is provided to the parties directly, via a roster, or otherwise.*

STANDARD VIII. FEES AND OTHER CHARGES

A. A mediator shall provide each party or each party's representative true and complete information about mediation fees, expenses and any other actual or potential charges that may be incurred in connection with a mediation.

1. If a mediator charges fees, the mediator should develop them 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 customary for such mediation services.

2. A mediator's fee arrangement should be in writing unless the parties request otherwise.

B. A mediator shall not charge fees in a manner that impairs a mediator's impartiality.

1. A mediator should not enter into a fee agreement which is contingent upon the result of the mediation or amount of the settlement.

2. While a mediator may accept unequal fee payments from the parties, a mediator should not allow such a fee arrangement to adversely impact the mediator's ability to conduct a mediation in an impartial manner.

Federal Guidance Note: *Although most federal employee mediators do not charge fees or are prohibited from charging fees, the programs for which they work sometimes charge nominal fees or seek cost reimbursement. Federal employee mediators should be prepared to answer questions regarding such arrangements for the mediations that they conduct, and conform to sections A and B above, as applicable.*

STANDARD IX. ADVANCEMENT OF MEDIATION PRACTICE

A. A mediator shall act in a manner that advances the practice of mediation. A mediator promotes this Standard by engaging in some or all of the following:

1. Fostering diversity within the field of mediation.

2. Striving 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. Participating in research when given the opportunity, including obtaining participant feedback when appropriate.

4. Participating in outreach and education efforts to assist the public in developing an improved understanding of, and appreciation for, mediation.

5. Assisting newer mediators through training, mentoring and networking.

B. A mediator should demonstrate respect for differing points of view within the field, seek to learn from other mediators and work together with other mediators to improve the profession and better serve people in conflict.