# MEDIATION CONVENING AND INTAKE BEST PRACTICES

PRESENTED AT THE ABA SECTION ON DISPUTE RESOLUTION 2015 CONFERENCE

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### 2015 ABA SECTION ON DISPUTE RESOLUTION MEDIATION CONVENING AND INTAKE BEST PRACTICES

#### **MATERIALS LIST**

- 1. PANEL DISCUSSION OUTLINE prepared by Conna Weiner
- 2. MEDIATION INTAKE –GOALS AND CHECKLIST IN LIGHT OF NEED FOR IMPARTIALITY, VOLUNTARINESS, CONFIDENTIALITY AND SELF-DETERMINATION prepared by Conna Weiner and Nancy Greenwald
- 3. "THE IMPORTANCE OF INTAKE IN MEDIATION", Israela A. Brill Case, Boston Law Collaborative (used with permission)
- 4. EXCERPTS FROM UNIFORM MEDIATION ACT AND SELECTED STATE STATUTES REGARDING MEDIATION CONFIDENTIALITY prepared by Conna Weiner, referencing the statutory compilations available in Cole, et al, Mediation: Law, Policy & Practice 2014-2015 ed.
- 5. "WAYS TO MAKE MEDIATION SAFER IN CASES OF HIGH CONFLICT" prepared by Professor Kristen Blankley, University of Nebraska Law School
- 6. SAMPLE INTAKE FORM FOR INDIVIDUALS AND SMALL BUSINESS prepared by Conna Weiner and Nancy Greenwald
- 7. SAMPLE COMMUNICATION INVITING A PARTY TO PARTICIPATE IN MEDIATION prepared by Conna Weiner
- 8. MODEL STANDARDS OF CONDUCT FOR MEDIATORS (2005) (adopted by American Bar Association, American Arbitration Association and others):
- 9. MODEL STANDARDS OF CONDUCT FOR MEDIATORS: REPORTER'S NOTES (2005)
- 10. <u>ABA MODEL RULES OF PROFESSIONAL CONDUCT AMENDMENTS</u> (2002): Excerpts (Rules 2.4, 1.12, 3.3, 4.1, 2.1 and others relating to lawyer neutral role and ADR advising, advertising)
- 11. ABA CODE OF JUDICIAL CONDUCT (2007): excerpt Cannon 2.2 and comment
- 12. SAMPLE MEDIATOR DISCLOSURE FORM prepared by Nancy Greenwald
- 13. AGREEMENT TO MEDIATE CHECKLIST prepared by Conna Weiner
- 14. SAMPLE ENGAGEMENT AGREEMENT TO MEDIATE prepared by Nancy Greenwald
- 15. SAMPLE PRE-HEARING CONFERENCE/PROCESS REPORT prepared by Nancy Greenwald
- 16. WISCONSIN SUPREME COURT ON PRO SE LITIGANTS
- 17. **SPEAKER BIOS** -in program and/or available separately

## 2015 ABA SECTION ON DISPUTE RESOLUTION MEDIATION CONVENING AND INTAKE BEST PRACTICES.

#### ITEM 1: PANEL OUTLINE

Prepared by Conna Weiner

What Can and Should Mediators and ADR Providers Do When An Agreement to Mediate Does Not (Yet) Exist?

Confidentiality, neutrality, voluntariness and self-determination are critical elements of the mediation process. These principles potentially are challenged when one party wants to mediate, the other party (or parties - family, elder or complex commercial disputes, etc.) has not yet agreed to participate, and an ADR provider or individual mediator is asked to help persuade the party(ies) to come to the table. Additional issues pile on when a mediator hears about a dispute and wants to sell the mediation process (and the mediator) to potential parties. Ethics experts and practitioners will conduct an interactive session discussing best practices in convening a mediation.

Panel:

Conna Weiner: (moderator and co-presenter) Mediator and Arbitrator, AAA,

CPR, AHLA Panels, Women in Dispute Resolution Committee

("WIDR") of the ABA Section on Dispute Resolution

Nancy Greenwald: (co-presenter) Mediator and Arbitrator, AAA, WIDR Kristen Blankley: University of Nebraska Law School, Co-Chair Dispute,

Resolution Section Mediation Ethics Subcommittee

Kimberly Taylor: VP JAMS, Co-Chair Dispute Resolution Section Mediation Ethics

**Guidance Committee** 

#### I. OVERVIEW OF TOPICS AND MATERIALS

In the live discussion, we are focusing on the various issues involved in bringing parties to the mediation table before an agreement to mediate is obtained. The materials accompanying this panel discussion, however, include materials that deal with the larger issue of the types of topics that should be covered during the mediation intake process, sample agreements to mediate and other materials of potential interest. The items available are as follows:

#### 1. Panel Discussion Outline

2. Outline: Mediation Intake – Goals and Checklist in Light of Need for Impartiality, Voluntariness, Confidentiality and Self-Determination (prepared by Conna Weiner and Nancy Greenwald) (includes references to pieces on convening and intake)

- 3. "The Importance of Intake in Mediation" Israela A. Brill Case, Boston Law Collaborative (used with permission)
- 4. Excerpts from Uniform Mediation Act and selected state statutes regarding mediation confidentiality (prepared by Conna Weiner referencing the statutory compilations available in Cole, et al, Mediation: Law Policy & Practice 2014-2015 ed.)
- 5. "Ways to Make Mediation Safer in Cases of High Conflict" (prepared by Professor Kristen Blankley, University of Nebraska Law School)
- 6. Sample Intake Form for Individuals and Small Business (prepared by Conna Weiner and Nancy Greenwald)
- 7. Sample communication inviting a party to participate in mediation (prepared by Conna Weiner)
- 8. <u>Model Standards of Conduct for Mediators</u> (2005) (adopted by American Bar Association, American Arbitration Association and others):
- 9. Model Standards of Conduct for Mediators: Reporter's Notes (2005):
- 10. <u>ABA Model Rules of Professional Conduct Amendments</u> (2002): Excerpts (Rules 2.4, 1.12, 3.3, 4.1, 2.1 and others relating to lawyer neutral role and ADR advising, advertising)
- 11. ABA Code of Judicial Conduct (2007): excerpt Cannon 2.2 and comment: 1 page
- 12. Sample Mediator Disclosure Form (prepared by Nancy Greenwald)
- 13. Agreement to Mediate Checklist (prepared by Conna Weiner)
- 14. Sample Engagement Agreement to Mediate (prepared by Nancy Greenwald)
- 15. Sample pre-hearing conference/process report (prepared by Nancy Greenwald)
- 16. Wisconsin Supreme Court on Judicial Assistance to Pro Se Litigants
- 17. Speaker bios (in program and/or available separately)

#### II. CONVENING UPON REQUEST

A. Discussion of opening hypothetical involving *individual mediator* convening and intake of a party *unrepresented by counsel* where the other party has *not yet agreed to mediate*:

Tracy, an independent mediator and lawyer who works without an office staff or an intake administrator, gets a phone call Fred, who saw her online advertising and web page. Fred, the owner of a luxury goods business, is having a serious business dispute with his partner, and his partner's subcontractor, about their profit-sharing arrangement in connection with a trade show.

Fred seems to know a little bit about mediation, wants to avoid having to pay a lawyer and wants the mediator to call the other parties to convince them to mediate with him. He states that he has heard that 85% of cases that are mediated settle. He tells Tracy quite a bit about what happened from his perspective before Tracy can get a word in edgewise, getting more emotional as he proceeds.

From what Fred says initially, Tracy suspects that she may have had contacts with the one of Fred's partner's sub-contractors. It is also quite unclear who is actually involved in the dispute or would need to approve any agreement. Tracy has never been to a trade show or seen underlying contracts concerning display, revenue-sharing or other related arrangements.

There are very different views about how to proceed here. It is a controversial subject. Some mediators won't make the contact with the other party because of the issues involved.

Before we start the discussion: Who would make the call? Who would not? What are the concerns?

1. Confidentiality: Is this opening discussion confidential?

What are your views?

The issue is whether or not the screening and intake processes that take place before there is an agreement to mediate in place is protected by any applicable mediation confidentiality statutes. See UMA and selected state statutory compilation in the materials for this panel.

Uniform Mediation Act: "mediation communication" means a statement, whether oral or in a record or verbal or nonverbal, that occurs during a mediation or is made for the purpose of considering, conducting, participating in, initiating, continuing or reconvening a mediation or retaining a mediator.

CA: includes a separate definition of "mediation consultation" (purpose of initiating or considering...)

Louisiana: protects all oral and written communications and records "made during the mediation."

MA: memoranda and other work product prepared by a mediator and a mediator's case files protected...any communication "made in the course of and relating to the subject matter of any mediation and which is made in the presence of such mediator..."

2. What information should be collected from the caller in advance of any attempt to contact the other party(ies)?

What are your views?

(a) Issues: One issue is whether or not it will compromise a mediator's neutrality to learn much about the dispute from one side before an agreement to mediate is even established. The level of confidentiality is also of concern. A practical issue is whether or not it is worthwhile given competing demands on a mediator's time to engage in extensive intake at this point. However, shouldn't the mediator determine whether or not he or she has conflicts, can be impartial and is competent to hear the dispute before contacting the other party(ies)? Knowing whether or not the parties have attorneys is also important.

#### (b) Possible Approaches to Requester Intake

1. Limit initial discussion with requester to bare minimum and be able to tell the other part(ies) that the mediator had very little knowledge of the underlying dispute?

2. Only communicate about and advocate for process, without any discussion of the facts or key issues?

3. Consider asking Fred to back up and systematically (i) conveying to Fred certain basics about the mediation process, and (ii) soliciting information from Fred about the parties and the dispute as set forth below and in the Sample Intake Form for Individuals and Small Business (in our accompanying materials). This type of preparation can be critical in establishing the groundwork for a robust mediation process. Consider also the 2005 Model Standards of Conduct for Mediators, including need to decline if cannot conduct mediation impartially and obligation to 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 the mediator.

- \*Make sure Fred understands the mediation process and the limits of a mediator's role. Ask about his prior experience with mediation. If you are a lawyer, ethically you are bound to disclose this to Fred and explain the difference (voluntariness; mediator role clarification).
- \*Be as clear as possible about whether or not the conversation is confidential.
- \*Urge Fred to seek legal advice should he need it before proceeding (self-determination).
- \*Explain that an agreement to mediate will need to be signed by all parties and that if a mediation occurs there will be fees involved.
- \*Identify ALL of the parties potentially involved, whether they have attorneys and whether or not there is a court case. Ask to see any public court papers.
- \* Probe for general information about the dispute and Fred's desired result: subject matter, what events have happened to date, what Fred would desire to see coming out of a mediation, what actions he has taken to contact the other party or to resolve the dispute, his last contact with his business partner, other relevant individuals who may need to be contacted or approve any dispute.
  - \*Encourage Fred to contact the other parties for the first time or to try again?
- \*In connection with the discussion of the dispute, be alert for potential conflicts and disclose them.
- \*In connection with the discussion of the dispute, be alert for issues relating to whether or not you are competent to hear the dispute.
  - \*Solicit issues about language difficulties, special needs, safety/abuse
- \*ASK WHAT INFORMATION YOU MAY SHARE WITH THE OTHER PARTY(IES) if you approach them (Confidentiality requirements of mediators ABA Standard V A. 1.
- 3. Possible Approaches to Contacting the Other Party (individual mediator)

What Are Your Views?

- (a) Phone call only to assess interest?
- (b) Letter or email involving briefly describing contact and describing mediation? (See sample communication in accompanying materials)

(c) Attach full intake form to communication or solicit this information over the phone? Getting equivalent information from both sides from the beginning helps preserve confidentiality.

B. Same hypothetical as in A above EXCEPT that one or both parties represented by counsel?

Are any of the issues above ameliorated if the person calling is the party's attorney, who states that he has mediated many times, and he is asking you to contact the other side's lawyer, who is also familiar with mediation?

C. Same Hypothetical as (A) EXCEPT the Requester calls an intake administrator at a mediation provider Who Will Not Be the Mediator [

Does intake or convening done by an administrator in the mediator's office or with a community organization who will not be the mediator help address any of the above issues? How is confidentiality affected?

D. Fees for Time Spent Persuading if No Mediation Takes Place?

Can or should a mediator or ADR provider charge for time spend trying to convene a mediation when that effort fails and no mediation takes place? Consider issues of perceived neutrality.

E. Can a Mediator – Lawyer Agree to Represent the Requester as an attorney if no mediation takes place? If the mediation goes forward but is not successful?

#### III. CONVENING WITHOUT A REQUEST

You, a mediator-attorney, hear about a significant dispute in your community involving an argument about ownership of a family-owned regional grocery store chain. The employees have sided with one of the family members and would like him to become the next CEO. They have refused to come to work. What issues are raised if you directly reach out to one or more parties to offer your mediation services? Is it better to go through an intermediary?

What Are Your Views?

See Model Standards of Conduct for Mediators Standard VII, Advertising and Solicitation – no promises as to outcome; not solicit in a manner that gives an appearance of partiality for or against a party.

Additional concerns for attorneys?

IV. Does Anything Change in the International Context?

Kim Taylor (Dispute Resolution International Committee Chair) will present a few points relevant to the international context to raise awareness.

## 2015 ABA SECTION ON DISPUTE RESOLUTION MEDIATION CONVENING AND INTAKE BEST PRACTICES

# ITEM 2: MEDIATION INTAKE – CHECKLIST IN LIGHT OF NEEDS FOR IMPARTIALITY, VOLUNTARINESS, CONFIDENTIALITY AND SELF-DETERMINATION

Prepared by Conna Weiner and Nancy Greenwald

(See also Item 6, Sample Mediation Intake Form and Item 8, ABA Standards of Conduct for Mediators)

A. Is mediation the best dispute resolution process for the problem?

- 1. What is "intake?": The first meaningful communication between a mediator and a potential client. If referred by a court, mediation is already the chosen dispute resolution process.
- 2. Compare "convening": "Conflict interventions usually begin with a convening process, in which the disputants come together with a third party to discuss the conflict and decide on a course of action....Convening is the first stage in conflict intervention. Its role, as the name implies, is to bring disputants to a preliminary meeting where they will discuss the issues of a conflict and consider options for its resolution. Its goal is to pave the way for an actual conflict resolution process such as mediation, negotiation or consensus building.<sup>2</sup>

\*convening is also used more generally in mediation to mean securing the agreement of all parties to mediate; this is part of the mediation intake process.

3. Mediation intake should include some element of convening assessment as defined in point 2 above. Ideally, many of the questions asked below should inform a discussion with the client as to whether or not mediation is the appropriate next step. Explaining that compromise is key to a good mediation is critical.

<sup>&</sup>lt;sup>1</sup> We are indebted to Israela A. Brill – Case of the Boston Law Collaborative for allowing us to include with our materials "The Importance of Intake in Mediation." See Item 3. A number of our points here were influenced by this piece.

<sup>&</sup>lt;sup>2</sup> Spangler, Brad. "Convening Processes." *Beyond Intractability.* Eds. Guy Burgess and Heidi Burgess. Conflict Information Consortium, University of Colorado, Boulder. Posted October 2003 http://www.beyondintractability.org/essay/convening-processes.

B. Assess the degree to which you can promise that the intake process before an agreement to mediate is signed is confidential in your state or program

- 1. Different states have different definitions of what is covered by their confidentiality statutes, to the extent that confidentiality of mediation communications is required by statute. <sup>3</sup> We understand that Virginia amended its mediation confidentiality statute to specifically include intake and screening due to the incidence of subpoenas issued to receptionists and intake administrators by attorneys.
- 2. The period before an agreement to mediate is signed is a time for appropriate caution. Depending on the rules applicable to your program or in your state, you may want to adjust the amount of information you collect in writing.

C. Convening at the Request of One Party - Reaching Out to Bring Another Party to the Table Requires Special Care

- 1. Many individual mediators are reluctant to try to persuade a party to mediate who has not yet agreed to do so because, among other things, it may compromise their neutrality in the eyes of that party. There are also issues potential confidentiality issues, as referenced above, if an agreement to mediate has not been signed. Mediator-lawyers may be reluctant to reach out to those who may be represented by counsel. We think that these issues can be managed and that it is a good thing to try to increase awareness of and the use of mediation.
- 2. Understand what efforts the person who has called you for help has made to approach the other party (this will come out in the intake form elements we suggest below). Although we do not think it is at all inappropriate for mediators or mediation providers to reach out to parties to persuade them to mediate, it is obviously ideal for the parties to come to you having agreed to mediate.
- 3. Ensure that you understand whether the parties are represented by counsel, in particular the party to whom you will be reaching out. Ask the party who has called you to request your assistance whether or not he knows if the other party is represented by counsel. If there is counsel involved, and you know the identity of that attorney, you should consider addressing your communications to the attorney as well as the other party.
- 4. We do not believe that the ethical problems associated with a lawyer representing a client calling an opposing party directly when he or she knows that that party is represented by counsel are triggered when a lawyer-mediator is clearly playing the role of a mediator in contacting a represented party wearing their

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<sup>&</sup>lt;sup>3</sup> See selected statues included with our materials as Item 4. The Uniform Mediation Act appears to cover intake confidentiality.

mediator hat. Nevertheless, particularly when the mediator is also an attorney, it is the better practice to make the other side's attorney aware of the contract.

- 4. Assess the form in which you (either a mediator or mediation provider) will approach the other party: Letter? Email? Telephone call? An email that can be copied to the party who has approached you for help may be the most transparent and is especially appropriate if the other side is represented by an attorney.
- 5. Encourage, as a next step, a joint session with the all parties to discuss the mediation process further in other words, encourage a joint "convening" process.
- 6. The emphasis in these "pre-agreement" mediation communications will be on education about the mediation process and accurate "promotion" of the effectiveness of the mediation process. We think that teaching people about the mediation process is one justification for engaging in the convening process.
- 7. Try, at some point, to give the more reluctant party the same opportunity to answer the intake questions we suggest below and in the sample intake form so that you start collecting "equal information" from both sides. The party won't necessarily be ready to engage in full intake, but the same questions should be asked about the dispute to the extent possible and practical. This is particularly important in connection with issues relating to safety/abuse, competence, disabilities, etc. Try to control the level of detail shared about the dispute at this point, while getting the information you need to assess conflicts, your competence and other important issues (see D 1 below)
- 8. Do not share what the requesting party has told you during their initial discussion with you unless you have their agreement, just as you would treat communications made during an individual session during the mediation.
- 9. Individual mediator involvement in suggesting mediation to another party may present more issues than having intake staff who will not be mediating (such as the effect on the appearance of impartiality).
- D. Intake questions should be systematic, consistent and reasonably thorough; both parties should participate in mediation intake if time allows
- 1. Some mediators prefer to know as little as possible about the dispute and the participants before the mediation is commenced in order to preserve their impartiality. We recommend working from a reasonably detailed mediation intake form (See Item 6 in these materials) because we believe that the benefits outweigh the risks in this regard, as is discussed throughout this outline. For example, questions regarding mediator conflicts and competence to hear the dispute should be understood up front, as well as who should attend the mediation or would need to approve any agreement.

- 2. If intake confidentiality is a concern in your state, be careful about recording "admissions" by a potential mediation client that, for example, they owe money.
- 3. Ideally, as mentioned above, both/all involved parties should fill out or provide the information sought by your checklist or form. Being able to tell the parties that equivalent information has been provided during the mediation intake process by all "sides" helps support the mediator's neutrality and voluntariness of the participation by the parties. An agreement to mediate will also be executed, of course, but joint participation from the beginning is ideal.

E. Collect essential information about the parties and their special needs/barriers to a voluntary and safe mediation

- 1. Name, contact information, best times to reach them.
- 2. Assess whether or not there are any capacity issues that may affect the parties' abilities to participate in a fully self-determined way. This can be particular important in elder law matters; this area requires highly specialized and detailed intake and could be a separate panel discussion in itself.<sup>4</sup>
- 4. Assess whether or not there are any disability issues that may need reasonable accommodation.<sup>5</sup>
- 5. Assess whether or not there are any safety/abuse issues involve in the dispute. See panelist Prof. Kristen Blankley's piece included with our materials as Item 5 on "Ways to Make Mediation Safer in Cases of High Conflict." As with capacity and elder care issues, this sort of intake is highly specialized. Note exceptions to some state confidentiality statutes for threats, criminal plans, etc. See Item 4, statutory excerpts, included with our materials.

 $\frac{http://www.eldersandcourts.org/\sim/media/Microsites/Files/cec/ACR\%20Guidelines\%20for\%20Elder\%20Caring\%20Coordination\%202014.ashx$ 

<sup>&</sup>lt;sup>4</sup> There are numerous resources available on the internet relating to elder care mediation training and assessment issues; see, for example the Association for Conflict Resolution Task Force on Eldercare Coordination October 2014 report,

<sup>&</sup>lt;sup>5</sup> See Questions and Answers for Mediation Providers: Mediation and the Americans with Disabilities Act (EEOC, Department of Justice) <a href="https://www.mediate.com/articles/eeocada.cfm#">www.mediate.com/articles/eeocada.cfm#</a>

- F. Determine Prior Experience with and Provide Education About and Support for the Mediation Process; Encourage the Parties to Obtain Legal or Other Advice Necessary to Support the Principle of Self-Determination
- 1. Ask the parties whether or not they have prior experience with mediation and their understanding of the process. This is especially important in cases where you are bringing another party to the table.
- 2. Describe the process, possibly with reference to additional resources you like (videos, on-line pamphlets, etc.)
- (a) voluntary and non-binding both parties will need to sign an agreement to participate in the mediation process; no one can be forced to sign an agreement regarding the dispute, and the mediation can be ended at any time.
- (b) confidential they will agree to keep the mediation confidential and many state laws and programs provide that the mediation is confidential
- (c) mediator is neutral and impartial and is simply helping the parties communicate, understand their needs and interests and come to an agreed compromise; the mediator may be a lawyer but will not give legal advice to either party
- (d) Encourage parties to seek legal advice from a qualified attorney on legal issues or other professionals (social work, psychiatrist, etc.) as necessary. This is critical to the principle of self-determination/informed consent.
- (e) If you perform "evaluative" mediation, disclose this to the parties and get permission from all of them to do this; disclose other issues about your style of mediation. <sup>6</sup>
- 3. Encourage the use of mediation as an effective tool for resolving disputes outside of court in a time-saving and cost-effective way, but don't oversell possibility of reaching an agreement. (See ABA Model Standards of Conduct for Mediators, included in our materials as Item 8, Standard VII, Advertising and Soliciting).
- G. Collect Information about the dispute to help assess the status of the dispute, what the parties think they are entitled to, how they see the dispute being resolved and who needs to be at the mediation to really resolve the conflict.
- 1. The intake collection form should have a reasonably detailed list of subject areas which may arise in your practice.
- 2. Determine whether or not a court case is pending involving the dispute and secure the public documents and lawyer contact details (see discussion in

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<sup>&</sup>lt;sup>6</sup> If the mediator will play an evaluative role, this should be disclosed and agreed in the agreement to mediate. See Agreement to Mediate checklist included as Item 13.

Section C 3-4 above); caution parties not to share privileged and confidential information without their attorneys' consent and before an agreement to mediate is signed.

- 3. The intake collection form should contain open-ended but reasonably probing questions about the nature of the dispute, such as:
- (a) Describe the events that have happened to date; what is the basic nature of the dispute? Is it about money owed? More than that?
  - (b) What actions have you taken to resolve the dispute?
- (c) What actions, if any, has the other party taken to resolve the dispute? What do you think their position is regarding the dispute and why?
- (d) What other actions do you believe that you need to take to resolve the dispute?
- (e) What are you hoping will come out of the mediation? [Listen, then probe:] Just an agreement about money? Any form of non-monetary benefit, such as return of goods, acknowledgement that they will do certain things under a contract or otherwise, or stop doing something? An apology?
  - (f) What was your last contact with the other party about this dispute?
- (g) others involved in the dispute; who needs to be at the mediation in order to resolve?
- (h) Do you need approval from anyone else in order to come to an agreement about resolving the dispute?
- (i) What information or documents do you think that you will need to resolve the dispute?
- H. Assess to what extent pre-mediation preparation may be necessary and appropriate

Complex commercial and other types of matters involving a number of parties and complex issues often involve significant pre-mediation preparation such as information and document exchange, individual sessions with the mediator after the mediation is agreed to but before it is convened, preparation of position papers by attorneys, etc. Preparation is often significantly under-utilized in part because its benefits significantly under-appreciated. (There is also the practical issue of time.) As you are collecting information about the dispute, you should be assessing the benefits of pre-mediation preparation as part of the intake process. (see questions G 3 (h) and (i) above, for example)

#### I. Identify and Evaluating Potential Conflicts of Interest

- 1. Impartiality is absolutely critical to the mediation process. It is important to go beyond basic questions during intake to try to flush out potential conflicts of interest. <sup>7</sup> The questions under Sections E-G above will help flesh out these issues. To evaluate potential conflicts of interest, you need to learn who the parties are, what they do and on whom they are relying for support. In commercial transactions, the names of individuals involved in the transaction or contract, the names of any experts who have rendered an opinion, the companies/individuals who have provided estimates of damages claimed, etc. Family and elder care matters often involve others outside of the immediate dispute.
- 2. To help the parties determine whether or not they believe that conflicts exist, ideally a mediator disclosure form should be prepared by the mediator discussing his/her background and experience that can be provided to potential mediation participants. This is done consistently in arbitration, but not so consistently in mediations.
- J. Assess Your Competence to Mediate a Particular Case

Disclose your experience to the parties and any limitations you may have.

K. Intake is an opportunity to get a sense of the clients, their personalities and negotiating styles<sup>8</sup>

Listening to how the parties express themselves gives you insight into what to expect from them in mediation. Make certain that you believe that you can work with these parties about this particular problem. Gain information about potential party dynamics that may derail the mediation if not managed.

L. Disclose your fees and costs.

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Intake issues can and should be more fully explored in individual premediation sessions after the mediation has been successfully convened.

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<sup>&</sup>lt;sup>7</sup> See n. 1, supra, Brill-Case, The Importance of Intake in Mediation

<sup>8</sup> See id.

#### The Importance of Intake in Mediation

By Israela A. Brill-Cass, Esquire

What is Intake? "Intake" is a word used to describe that first meaningful communication between a mediator and a potential mediation client. It's defined as "...the act of taking in; something, especially energy, taken in. (American Heritage Dictionary)

It's the last piece of this definition – "energy taken in" – that is at the core of mediation intake. We often describe mediation in terms of energy, asking: What is the chemistry in the room? Is the energy right for settlement? Are the dynamics positive and are they enabling resolution? When they're not working, we take a break, caucus or shift direction with our questions in the hopes of infusing positive energy into the process.

Intake is often the first moment at which we are able to begin to create that positive energy. When someone reaches out to you as a mediator, you begin to share with them information about yourself, your practice and the process. In exchange they share with you information about who they are, what they're experiencing in their lives at that moment and what they hope, expect or possibly fear will happen in mediation. When this first exchange is positive, you begin laying the foundation for what will hopefully be a successful mediation. Recognizing the importance of intake helps you lay this foundation.

Intake gives you an opportunity to identify potential conflicts of interest. During that first interaction with a potential client, you are learning not only about their situation but also about who they are, what they do and whom they're relying on for support in connection with their dispute, if anyone. Layers of interactions with those not directly involved in the mediation itself present the potential for conflicts of interest. We've all encountered the "obvious conflict" – when you or someone you know is involved in the mediation; or when you or someone you know is related to the subject matter of the dispute. Chances are, you'll recognize a name – of an individual, a company, a professional involved – and it will trigger you to make an appropriate disclosure.

It's the "not-so-obvious conflict" that poses potential problems in mediation. By carefully asking questions at intake and getting beyond the basic information, we become able to identify less obvious but no less important potential conflicts of interest.

Potentially the most challenging kind of conflict is the "conflict-that-becomes-obvious-during-the-mediation." By its very definition, it is not a potential conflict that is discoverable by asking questions at the point of intake.

The bottom line is that neutrality is perhaps a mediator's greatest asset. If a client finds out about a potential conflict of interest once the process has started, particularly if they find out about it from someone other than the mediator, the mediator's neutrality can be called into question and the mediation irretrievably derailed. The more time you spend asking questions of clients during intake, the more information you get from them and the more likely you are to identify and disclose early on any potential conflicts of interest.

Intake gives you an opportunity to get a sense of the clients, their style and demeanor before you start the mediation. As in mediation, listening to the intonation

and words chosen by potential clients during intake can provide you with insight into what to expect from them when they are in a room with you and with each other.

Is the client using "loaded" words like "scared" or "nervous" that may refer to safety or abuse issues; or "able" or "capable" that could signal issues of mental capacity or readiness to engage in mediation or simply indicate a need for physical accommodations during the mediation? To avoid surprise during or after the mediation — ask the questions at intake and be prepared (to the extent that you can be) — before walking into the room.

Getting a sense of the clients' demeanor can also alert you to whether the clients might be people that you cannot or might not want to work with. Are these the type of clients that push your personal buttons? Are they giving you an indication that they don't feel there is a lot of value in the process or are they underestimating the value of your time? You want to know this sooner rather than later and intake is the perfect opportunity to find out before you're in too far.

Intake gives you an opportunity to assess the clients' willingness, ability or competence to engage in the mediation process. If possible, isn't it better to find out that a potential mediation client suffers from rapid-cycling bi-polar disorder before you're in the room with them? Equally important: finding out that someone thinks the other party has rapid-cycling bi-polar disorder before you're in the room with them. If someone doesn't have the capacity to participate in mediation, the best chance you may have to figure that out (and figuring it out does not mean diagnosing them) is to spend time talking with them. Trust your instincts and don't go down the road with someone you think might not be capable of decision-making.

**True story.** Every year or so my firm gets a call from a woman who describes an awful situation she believes herself to be in. She explains that she was forcibly divorced from her husband, not only without her consent but also without her knowledge or presence, by a judge who was in collusion with her husband, the Bar Association, the Board of Bar Overseers and the Attorney General. When you ask why this might have happened to her she cycles into a discussion of a conspiracy to ruin her life and shame her as a "divorced woman." The remedy she seeks is to be re-married to her former husband and to expose the conspiracy to the public to save others from suffering the same fate she believes she suffered.

It's incredibly sad and I'm struck by how exhausting it must be to be this woman and to feel that you're at the center of a conspiracy and that no one is listening. But if I'm not qualified to help this woman, this is a far better discussion for me to have with her by phone than in person. Only by spending time talking with someone like this can you realize that a person who initially comes across as well-spoken and lucid (as this woman does at first) may be in need of very different help than the average mediator can offer.

Intake allows you to begin to understand the clients' expectations and set appropriate expectations for the process. As much as many of us hate to admit it, mediation does have its limitations: among them that it will not punish someone who has, in the eyes of one of the parties, done "wrong," it will not completely undo a harm that has been done, and it will not necessarily vindicate someone who feels that they are completely in the right. (Quite to the contrary: the old saying goes that a good settlement is one in which the parties are equally unhappy and perhaps we should

reframe that to say instead that after a successful mediation both parties are equally happy.)

It's important in any case to set appropriate expectations with the clients, determine what they want, tell them what they can and shouldn't expect and ultimately help them decide if mediation or another process is suitable for them. This will minimize unrealistic expectations and hopefully avoid disappointment – with both you and the process itself.

Intake gives you an opportunity to educate clients. I know a lot of mediators don't like to use this terminology (but I'll say it anyway) intake gives you an opportunity to "sell your practice." It never ceases to amaze me how few people — clients and attorneys alike — know what a mediator does and fewer still know how the mediator's role differs from that of an arbitrator. Intake is the perfect time to educate the potential client about DR processes, the differences between them and when they might be appropriate. Since during this first interaction it's impossible to give potential clients all of the knowledge they need, it is also a good time to direct them to informational web sites or other resources that can help them get educated about mediation.

Intake is also the time for you to explain to a client your background and experience. In doing so, it is important to be completely honest about your level of expertise because the parties often look for someone with subject matter expertise in the area of their conflict.

As Benjamin Franklin said: "It takes many good deeds to build a good reputation, and only one bad one to lose it." Take the time during intake to educate clients about what you can and can't do for them. Never underestimate the power of word of mouth in the community and don't miss an opportunity to introduce yourself in a positive way – intake gives you just such an opportunity.

Intake gives you an opportunity to begin to understand the issues and the dynamics that will impact the mediation process. This is the energy we talked about - you are sharing yours with the potential clients, and they are taking a step towards sharing theirs with you. It's important to remember that when a potential client reaches out to us, they have taken a momentous step: they have shifted from being resigned to the situation they are in to considering that there may be an alternative; they are signaling that they may be ready to make a change in their lives and acknowledging that they need help to make that change; and they are letting us – asking us – to come into their lives to help them make that change. At the first moment you connect with someone who is in this position, you begin to create the energy needed to help them make that change. Don't let that moment go unnoticed because amazing things can happen.

Never underestimate what can happen during the course of an intake. Indeed, the mediation often begins at that first point of contact; and what energy you are able to exchange with the clients can and will be carried over into the mediation itself.

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### 2015 ABA SECTION ON DISPUTE RESOLUTION MEDIATION CONVENING AND INTAKE BEST PRACTICES

### ITEM 4: EXCERPTS FROM THE UNIFORM MEDIATION ACT AND SELECTED STATUTES BEARING ON THE CONFIDENTIALITY OF THE INTAKE PROCESS

Prepared by Conna Weiner2/7/15, referencing Cole, et seq., Mediation: Law Practice & Policy, 2014-15 edition, Sec. 8.27 and statutory appendices

Take - Away Point: Know your state law!

The Winner in this selection for breadth of coverage: Virginia

1. Uniform Mediation Act (11 states and D.C., including Washington state)

Section 2. DEFINITIONS

\* \* \*

(2) "Mediation communication" means a statement, whether oral or in a record or verbal or nonverbal, that occurs during a mediation or is made for purposes of considering, conducting, participating in, initiating, continuing, or reconvening a mediation or retaining a mediator.

\* \* \*

#### Section 4. PRIVILEGED AGAINST DISCLOSURE, ADMISSIBILITY, DISCOVERY

- (a) Except as otherwise provided in Section 6, a mediation communication is privileged as provided in subsection (b) and is not subject to discovery or admissible in evidence in a proceeding unless waived or precluded as provided by Section 5.
- (b) In a proceeding, the following privileges apply:
- (1) A mediation party may refuse to disclose, and may prevent any other person from disclosing, a mediation communication
- (2) A mediator may refuse to disclose a mediation communication, and may prevent any other person from disclosing a mediation communication of the mediator.
- (3) A nonparty participant may refuse to disclose, and may prevent any other person from disclosing, a mediation communication of the nonparty participant.

(c) Evidence or information that is otherwise admissible or subject to discovery does not become admissible or protected from discovery solely by reason of its disclosure or use in a mediation.

\* \* \*

#### Section 6. EXCEPTIONS TO PRIVILEGE

(a) There is no privilege under Section 4 for a mediation communication that is:

\* \* \*

- (3) a threat or statement of a plan to inflict bodily injury or commit a crime of violence;
- (4) intentionally used to plan a crime, attempt to commit or commit a crime, or conceal an ongoing crime or ongoing criminal activity

\* \* \*

- (7) sought or offered to prove or disprove abuse, neglect, abandonment or exploitation in a proceeding in which a child or adult protective services agency is a party, unless [alternatives: referred to mediation by court and a public agency participates, or public agency participates in mediation]
- (b) There is no privilege under Section 4 if a court, administrative agency, or arbitrator finds, after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available, that there is a need for that evidence that substantially outweighs the interest in protecting confidentiality, and that the mediation communication is sought or offered in:
  - (1) a court proceeding involving a felony [or misdemeanor]; or
- (2) except as otherwise provided in subsection (c) [mediator cannot be compelled to provide evidence in malpractice case or this section (b) (2)], a proceeding to prove a claim to rescind or reform or a defense to avoid liability on a contract arising out of the mediation.

NOTE: Reporter's notes on the 2001 UMA draft state that the definition of mediation communication was phrased to include "communications that a party would reasonably believe to be confidential, such as the explanation of the matter to an intake clerk"

2. California - Evidence

Sec. 1115 Definitions

For purposes of this chapter:

\* \* \*

(b) "Mediator" means a neutral person who conducts a mediation. "Mediator" includes any person designated by a mediator either to assist in the mediation or to communicate with the participants.

(c) "Mediation consultation" means a communication between a person and a mediator for the purpose of initiating, considering or reconvening a mediation or retaining the mediator.

\* \* \*

Sec. 1119 Written or oral communications during mediation process; admissibility.

Except as otherwise provided in this chapter:

(a) No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or mediation consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.

\* \* \*

- (c) All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential.
- 3. Florida Mediation Confidentiality and Privilege Act Sec. 44.401 et seg.

\* \* \*

Sec. 44.403 Mediation Confidentiality and Privilege Act; Definitions

(1) "mediation communication" means an oral or written statement or nonverbal conduct intended to make an assertion, by or to a mediation participant made during the course of a mediation, or prior to mediation if made in furtherance of a mediation. The commission of a crime during a mediation is not a mediation communication.

(2) "Mediation participant" means a mediation party or a person who attends a mediation in person or by telephone, vide conference or other electronic means.

\* \* \*

Sec 44.405 Confidentiality; privilege; exceptions

- (a) Except as provided in this section, all mediation communications shall be confidential. A mediation participant shall not disclose a mediation communication to a person other than another mediation participant or a participant's counsel...
- 4. Kentucky Sec. 336.010 Labor-Workplace Standards-Mediation

Sec. 336.153 Disclosure by mediators prohibited

Any person acting as a mediator in a labor dispute pursuant to the provisions of this chapter, who receives information as a mediator relating to the labor dispute, shall not reveal such information received by him in the course of mediation in any administrative, civil or arbitration proceeding.

5. Louisiana Title 9 Sec. 4101 et seg Louisiana Mediation Act

Sec. 4112 Confidentiality

A. Except as provided in this Section, all oral and written communications and records made during mediation, whether or not conducted under this Chapter and whether before or after the institution of formal judicial proceedings, are not subject to disclosure, and may not be used as evidence in any judicial or administrative proceeding.

6. Massachusetts Civil Proceedings - Mediation - Confidentiality

Chapter 233

Sec 23C Work product of mediator confidential; confidential communications; exception; mediator defined

All memoranda, and other work product prepared by a mediator and a mediator's case files shall be confidential and not subject to disclosure in any judicial or administrative proceeding involving any of the parties to any mediation to which such materials apply. Any communication made in the course of and relating to the subject matter of any mediation and which is made in the presence of such mediator by any participant, mediator or other person shall be a confidential communication and not subject to disclosure in any judicial or

administrative proceeding; provided, however, that the provisions of this section shall not apply to the mediation of labor disputes...

7. Michigan Community Dispute Resolution Act Sec. 691.1551 et seq.

\* \* \*

Sec. 691.1557 Work Product, Case Files, communications; confidentiality; exceptions

- Sec. 7 (1) The work product and case files of a mediator or center and communications relating to the subject matter of the dispute made during the dispute resolution process by a party, mediator or other person are confidential and not subject to disclosure in a judicial or administrative proceeding except for either of the following:
- (a) Work product, case files or communications for which all parties to the dispute resolution process agree in writing to waive confidentiality.
- (b) Work product, case files or communications which are used in a subsequent action between the mediator and a party to the dispute resolution process for damages arising out of the dispute resolution process.
- (2) Subsection (1) does not apply to statements, memoranda, materials and other tangible evidence, or otherwise subject to discovery, that were not prepared specifically for use in the dispute resolution process.
- 8. Montana Evidence Mediation Confidentiality

Sec. 26-1-813 Mediation-confidentiality-privilege-exceptions

\* \* \*

- (3) A mediator's files and records, with the exception of signed, written agreements, are closed to all persons unless the parties and the mediator mutually agree otherwise. Except as provided in subsection (5), all mediation-related communications, verbal or written, between the parties or from the parties to the mediator and any information and evidence presented to the mediator during the proceedings are confidential...
- 9. Pennsylvania Mediation Confidentiality

Title 42 Sec. 5949 Confidential mediation communications and documents

- (a) General Rule. Except as provided in subsection, (b) all mediation communications and mediation documents are privileged. Disclosure of mediation communications and mediation documents may not be required or compelled through discovery or any other process...
- (b) Exceptions (includes, among other things: to extent that the communication or conduct is relevant evidence in a criminal matter, doesn't apply to: communication of a threat that bodily injury may be inflicted on a person, damage may be inflicted on real or personal property under circumstances constituting a felony)...

\* \* \*

#### (c) Definitions

"Mediation." The deliberate and knowing use of a third person by disputing parties to help them reach a resolution of their dispute. For purposes of this section, mediation commences at the time of initial contact with a mediator or mediation program.

"Mediation Communication" A communication, verbal or nonverbal, oral or written, made by, between or among a party, mediator, mediation program or other person present to further the mediation process when the communication occurs during a mediation session or outside a session when made to or by the mediator or mediation program.

10. Texas Rev Stat. Civil Court Disputes – Alternative Dispute Resolution, Sec. 154.001 et seq.

154.073 Confidentiality of Certain Records and Communications

- (a) Except as provided by Subsections (c), (d), (e) and (f), a communication relating to the subject matter of any civil or criminal dispute made by a participant in an alternative dispute resolution procedure, whether before or after institution of formal judicial proceedings, is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding.
- (b) Any record made at an alternative dispute resolution procedure is confidential, and the participants or the third party facilitating the procedure may not be required to testify in any proceedings relating to or arising out of the matter in dispute or be subject to process requiring disclosure of confidential information or data relating to or arising out of the matter in dispute.

11. THE WINNER: Virginia Code Ann. Court-Referred Dispute Resolution Sec 8.01-576.10

Sec. 8.01-576.10 Confidentiality of Dispute Resolution Proceeding

All memoranda, work products and other materials contained in the case files of a neutral or dispute resolution program are confidential. Any communication made in or in connection with the dispute resolution proceeding which relates to the controversy, including screening, intake and scheduling a dispute resolution proceeding, whether made to the neutral or dispute resolution program staff or to a party, or to any other person, is confidential. However, a written settlement agreement shall not be confidential, unless the parties otherwise agree in writing...[exceptions include threats to bodily injury, crimes, misconduct, ethics complaints, etc.]

NOTE: Internet commentary that Virginia statute was specifically amended to cover intake because enterprising attorneys had been subpoening mediation receptionists and administrators.

#### **ITEM 5: SAFETY TIPS**

Prepared by Professor Kristen Blankley, University of Nebraska Law School

#### Ways to Make Mediation Safer in Cases of High Conflict

Mediation is, by its very nature, a potentially volatile situation. While our perception of mediation might focus on the end goals of peacemaking and relationship building, we often forget that parties enter the mediation in various states of conflict. While conflict is neither good nor bad in the abstract, conflict certainly has the potential to escalate if not successfully managed.

Safety should be one of our primary concerns as a mediator, if not our utmost concern. When we think about safety, we should consider the safety of the parties and ourselves. Safety concerns may come to light in a variety of situations, from threats of violence to table thumping to displays of weapons in the mediation room. This short article considers a wide variety of safety tips broadly arranged into the categories of pre-mediation, mediation session, and post-mediation.

#### **Before the Mediation Begins:**

#### **Know Your Surroundings**

Before you mediate, be sure that you have become familiar with the location where you will be conducting the session. Do you know where all of the *doors* and *emergency exits* are located? Can you locate the *fire alarm* or *telephone*? Will anyone be at that location if you are mediating at *night*? Will anyone be screening the parties for *weapons*? Is the *parking lot* well lit?

If you are mediating in your own location, you hopefully know all of this information already. If you are mediating on location for one of the parties or at a different neutral site, you may have to do some research, especially if you suspect some hostility. In some situations, mediating at a courthouse can be ideal, especially if you are concerned about the presence of a weapon or suspect the need for police back-up, if necessary.

#### **Keep Important Numbers on Hand**

Certainly, we all know that we can call 911 in an emergency. Other numbers can also be helpful, such as the *Department of Health and Human Services*.

#### **Address Safety Issues with Parties in Initial Private Sessions**

Conducting an *initial private session* of some sort with each party to a mediation can be helpful in a wide variety of mediation cases. During those sessions, you can talk to both parties about

the relationship with the parties and whether the parties have any particular *safety concerns*, *button-pushing* triggers, or suspicion of *weapons* possession. In Nebraska, for example, family mediators are required to screen for *domestic intimate partner abuse*, but an initial private session to discuss safety may be helpful in every case, no matter the subject matter. If the preparation session indicates that safety measures must be taken, you can make process choices based on these concerns, such as mediating in caucus or asynchronously.

#### **Prepare Yourself for the Individual Case**

In addition to the initial private session, mediators can engage in other preparation to help you make these safety decisions. It might be helpful to review the *case file* on JUSTICE or other type of database to determine if any *protection orders* have been sought or ordered in the case. In some situations, you might want to conduct a *background check* on a party.

#### **Understand Certain Human Behavior**

Most of us have heard about *fight or flight* (or *freeze*), but we could learn more about our human reactions to difficult situations. Understanding these reactions may help us understand our own behavior as well as the behavior in the parties in the room.

#### **During the Mediation:**

#### **Arrange Your Room**

Consider how you arrange your mediation room in order to promote safety. Consider who should sit *closest to the door* in the event that you need to quickly exit the room. Think about the *seating arrangement* and how closely the parties are to one another and your proximity to both of them. In the unusual situation, you may need to remove all *scissors*, *pencils*, *letter openers*, and other ordinary objects that may be used as weapons.

#### **Consider Modifications to Your "Usual" Procedures**

You may want to discuss safety issues in your mediator's *opening statement*, such as telling the parties that the process is intended to be a safe space and that you can take precautions if a party no longer feels safe. If you usually invite *opening statements*, you may decide to eliminate them so as to not heighten emotions. Alternatively, opening statements could be given in *caucus*, instead.

#### **Speaking of Caucuses**

Separating the parties in terms of space or time may be a safer way of mediating a high conflict case. If parties do not feel comfortable meeting in the same room, then use separate caucus rooms for the entire mediation. If parties do not feel comfortable being in the same building at the same time, then you could consider an asynchronous mediation meeting with different parties on different days.

#### Take a Break

If things get heated during a session, changing something in the situation may help calm the temperature in the room. Your options are plentiful: *take a break*, *tell a joke*, *offer some snacks*, *call a bathroom break*. In an extreme situation, you may need to *close the session*. These techniques should help diffuse the situation and help you assess whether a safety threat is real.

#### **Have Some Company**

If you do not feel comfortable being alone with the parties, then make appropriate arrangements. In some situations, solo mediators may want to use a *co-mediation* model in order to assert additional authority in the room. At a minimum, you may want to ensure that other *office personnel* are in the building and able to check in on your room if tensions elevate. To achieve these ends, you may need to mediate *during business hours* and avoid nights and weekend mediations.

#### **Stay Aware**

When you suspect that safety may be a concern, you should stay alert. Consider trying to widen your peripheral vision in order to take in more of the room. Be sensitive to sudden movements, especially if you fear a weapon in the room. In addition, keep an eye on the non-aggressing party to determine if that party is giving non-verbal cues that the aggressor party may be escalating.

#### **Trust Your Gut**

Many of us are mediators because we have a good way with people and can often *read their emotions*. If you think a party is merely joking or letting off steam, you very well might be right! Although we generally err in favor of more safety than less, we also do not want to go overboard. We also want to do our best not to escalate the situation ourselves.

#### **Following the Mediation:**

The moments following the close of a mediation may be one of the most critical times in the entire process. Stagger the exit times of the parties, if possible. One easy way to stagger the exit times is to break the parties into caucus rooms and dismiss the victim party first, while the aggressor party is still in the building. Have the parties leave through different exits, if possible, and walk the parties to their car, if appropriate. In extreme circumstances, you may need to call a police escort to ensure that both parties leave the mediation safely.

## 2015 ABA SECTION ON DISPUTE RESOLUTION MEDIATION CONVENING AND INTAKE BEST PRACTICES

#### **ITEM 6: SAMPLE INTAKE FORM**

Prepared by Nancy Greenwald and Conna Weiner

Note to Participants: This form is designed to provide a template for the types of information that should be collected from all parties as part of the mediation intake process in matters involving individuals and small businesses. Whether or not the entire form is completed in writing (in hard copy or on line) or all or parts of it are completed (or only discussed) on the telephone or in person will depend on (a) the level of confidentiality protection available for the intake process – before a mediation has been agreed to by the parties – and (b) the preferences/practices of an individual or mediation organization. It can and should be used as relevant by all parties who have agreed to be involved in the mediation so that each party understands and appreciates that they have had an opportunity to give the mediator equivalent information from the very beginning.

We are aware that some mediators believe that it is best to know as little as possible about the matter to be mediated to prevent the possibility of mediator bias. Again, this will be a matter of individual mediator preference, but in our experience preparation on the issues set forth in this form can be critical in laying the groundwork for a robust mediation. As we have noted above, however, it is important to attempt to collect the information from all parties.

This form is aimed at individuals and small businesses approaching mediators or mediation organizations on their own behalf. Complex business disputes involving parties represented by attorneys are highly likely to require, among other things, more extensive pre-mediation preparation by the parties and mediator regarding the information/documents relevant to and legal aspects of the dispute once an Agreement to Mediate is signed, including the preparation of pre-mediation position papers for the mediator. The basic issues set forth below will still need to be discussed and collected as part of the initial intake process at an appropriate level of detail depending on the sophistication of the parties.

#### **INSTRUCTIONS:**

WHAT IS MEDIATION? [insert your or your organization's description; the following is one of many options] The purpose of the mediation process is to assist individuals or businesses to work together to negotiate a resolution of a dispute that is acceptable to each of them and that they believe is better than no agreement or alternative ways of resolving their dispute, such as litigation. It is voluntary – it can be ended by any of the participants at any time -- and non-binding, unless, of course, each side agrees to enter into an agreement to settle their dispute as a result of participating in mediation. The mediator is not serving as a lawyer for either side; he or she is a neutral, impartial participant helping the parties to communicate and identify their important needs and interests and reach an agreement. We will also agree to keep the mediation confidential. Mediation has the potential to be a quick and cost-effective way of resolving disputes and preserving relationships. More information about the process can be found at \_\_\_\_\_\_\_ [insert mediator or organization website, links to videos about mediation such as ABA/Suffolk University materials, etc.]

**FILL OUT THIS FORM TO REQUEST MEDIATION**. Please fill out this form to request mediation. The information will help the mediator understand basic issues about you and, as relevant,

your business and the dispute. Filling out the form does not require you to go to mediation. You will not be committed to mediate or to pay fees until you and the other person or business agrees to mediate by signing an Agreement to Mediate. If we go forward with the mediation, the mediator [our organization] will charge fees in accordance with our fee schedule [which is attached] [is available on \_\_\_\_\_\_]. We generally recommend that the parties share the fees equally. You can find an Agreement to Mediate [Answer depends whether your form is online, you are meeting in person, or speaking over the phone.] After you fill out this form, we can usually get started within one week. Getting started might include some preparation by each party (finding documents, talking to the mediator individually about the dispute) before actually starting the mediation. We will also want the other parties involved in this dispute to fill out this form so that we have similar information from both of you before we start.

**LEGAL ADVICE:** It is important that you are able to make informed choices about how you deal with your dispute. As noted above, we do not give legal advice to our mediation clients. If you think that you need to talk to a lawyer about your legal rights before or during the mediation, we strongly encourage you to do so.

**PART I: IDENTIFY THE PARTIES AND DESCRIBE THE DISPUTE.** The first part of the form gives us contact information about you, a short description of the problem, and contact information about the other person or business involved in the dispute. If the dispute is already in court or in an arbitration or other legal process and you have been sent to mediation, it is very important that you let us know. It is also important to know whether or not you or the other party have retained a lawyer to help you with the dispute.

#### PART II: YOUR PRIOR EXPERIENCE WITH MEDIATION OR

**ARBITRATION/LITIGATION.** It will help us structure the process to know whether or not you have had previous experience with mediation, arbitration or litigation. Only very general information is required.

**PART III: SPECIAL ISSUES INVOLVING THE PARTIES:** In this Section we ask about language, hearing, mobility, capacity, safety or any other issues that you believe may affect the ability of the potential participants to participate in the mediation.

**PART IV: THE DISPUTE AND YOUR DESIRED RESULT.** In this Part, we will be asking you to tell us about the details of the dispute and your desired result.

#### PART 1: IDENTIFY THE PARTIES AND DESCRIBE THE DISPUTE

ABOUT YOU	Name:	
	Phone number:	
	Email address:	
	Mailing address:	
If you have a lawyer representing you in connection with this dispute, please list their information:	Lawyer's name:	
	Lawyer's Phone number:	
	Lawyer's email address:	
	Lawyer's mailing address:	
ABOUT THE OTHER PARTY	Name:	
(Please fill in any information	Mailing address:	
you have. If you don't have the information, just write "I don't		
know.")  0 The other party has a lawyer but I do not know their contact information	Phone number:	
	Email address:	
	Lawyer's name:	
0 I do not know whether or not the other party has a lawyer	Lawyer's Phone number:	
	Lawyer's email address:	
	Lawyer's mailing address:	
If you are the first person to contact the mediator, have you contacted the other company (person or company) about using a mediator to resolve this case, or do you need us to do this?	O I have not contacted the other party. Please contact them for me. O I have contacted the other party and they are not sure they want to mediate or don't want to. Please contact them for me. O I have contacted the other party and they seem willing to mediate. Please contact them for me. O I will contact the other Party (for the first time) O I will try once more to contact the other party and encourage them to mediate. O I have already agreed with the other Party to try to use mediation to resolve this case. O I am the other party and I have agreed to mediate the dispute.	
CASE STATUS:	NAME OF COURT	
If a court case has been filed by you or the other side, please fill out this section.	NAME OF COURT:	
IMPORTANT – IF A CASE HAS BEEN FILED WE	NAME OF CASE:	
NEED TO SEE A COPY OF THE COMPLAINT AND	NEXT HEARING DATE:	
ANY OTHER PUBLIC		

COURT DOCUMENTS	please use this space describe what happened.)		
YOU HAVE.			
DO NOT SEND ANY	RELIEF REQUESTED:		
CONFIDENTIAL	Money/Damages:Non-monetary relief (injunction,		
DOCUMENTS OR	other):		
PRIVILEGED MATERIALS	3333,		
FROM YOUR ATTORNEY.			
IF YOU HAVE ANY			
QUESTIONS OR CONCERNS ABOUT THIS			
ISSUES, PLEASE			
CONTRACT YOUR			
ATTORNEY			
Please tell us what the issue is; you should check all that apply  [NOTE: EXPAND THIS LIST AS BROADLY AS POSSIBLE; consider use of separate appendices for each type of dispute to collect specific information (are children are involved in a divorce, etc.)]			
divorce/separation	business issues (partnership, shareholders)		
elder care	neighbor dispute		
other family law issues	landlord/tenant		
parent/student-teacher issue	condo/cooperative association		
student relationships in school	other school-related issues		
consumer complaint (with a retailer or vendor, for exam	contract issue (such as breach of contract) ple)		
other (please list)			
PART II: TELL US YOUR PRIOR	R EXPERIENCE WITH MEDIATION AND LITIGATION		
1. Have you ever been in a mediation b	pefore?		
2. If the answer to 1 is yes, what, in general, was the subject of the mediation?			
3. If the answer to 1 is yes, what was your view of the process? Do you have any concerns about the process?			
4. Have you ever been involved in a lit	igation?		
5. If yes, what, in general was the subjection	ect of the litigation?		

### [NOTE: CONSIDER THE EXTENT TO WHICH THE REMAINDER OF THE INFORMATION ON THIS FORM SHOULD BE MEMORIALIZED IN WRITING ]

#### PART III: SPECIAL ISSUES INVOLVING THE PARTIES

[NOTE: Consider developing separate appendices more fully to address the issues below]

- 1. Will you or the other party need English language translation assistance during the mediation? If so, what language(s)? Will someone be able to attend the mediation who can translate for you?
- 2. Do any of the parties have any special needs that will need to be accommodated during the mediation (hearing, sight, mobility issues, etc.)?
- 3. Are there any capacity issues that may arise in connection with the participants (ability to understand, etc.)?
- 4. Do you have any safety concerns involving the potential participants in the mediation?
- 5. Are there any other special needs or issues that we should know about?

#### PART IV: TELL US ABOUT THE DISPUTE AND YOUR DESIRED RESULT

- 1. Please provide a brief description of the events to date:
- 2. Please discuss what you are hoping for as a resolution of the dispute: [These are examples only: Resolution of an issue about money? How much, and how is that amount calculated? Resolution about something other than money? Apology? Having the other party stop doing something? Start doing something? What else? What is your "ideal" result?]
- 3. What actions have you taken to resolve the dispute?
- 4. What other actions do you believe you need to take to resolve the dispute?
- 5. What actions, if any, has the other party taken to resolve the dispute?
- 6. What actions do you believe the other party should take to resolve the dispute?
- 7. What was your last contact with the other party about this dispute?
- 8. Are there any other people involved in the dispute or who have information about the dispute? If yes, please tell us their name, relationship to you or the other party, and describe how they are involved in the dispute.
- 9. Who do you think needs to be at the mediation in order to resolve this dispute? Anyone besides you and (the other party or business)? Please identify them.

- 10. Will you need approval from anyone other than yourself to come to an agreement about this dispute? If so, who is that?
- 11. What other information would you like us to know?
- 12. Please provide copies of/upload any documents you believe are important. Do not give us any confidential documents yet, or privileged documents from your attorney. We will explore exchanging confidential documents once the Agreement to Mediate is signed.
- 13. What additional information or documents do you think that you will need to help you understand the other party's position and to resolve the dispute?

Please take a moment to double check your information.

THANK YOU

# 2015 ABA SECTION ON DISPUTE RESOLUTION MEDIATION CONVENING AND INTAKE BEST PRACTICES

# ITEM 7: SAMPLE LANGUAGE FOR "CONVENING" COMMUNICATION (LETTER, EMAIL, OR PHONE) TO A PARTY WHO HAS NOT YET AGREED TO MEDIATE

Prepared by Conna Weiner, <u>www.connaweineradr.com</u>

Dear:	
try to resolve their disputes amicably	I [am a neutral mediator who helps parties v] [with a mediation organization called eutral mediators to help parties resolve their
try to have us assist in resolving a dis understand that the dispute concerns description agreed to with the persor court case has been filed.] Although _ dispute, I am a neutral party and it is party's lawyer. If you agree to mediat	n who called you.] [He/she also told me that a told me a little bit about the not my role to take sides or serve as any e, it is [my] [our] job to help you and try to come up with an agreed solution or
	u in this dispute, you should let me know right nave contacted you. They will probably want to that is up to you.
potential to resolve their problems m	ost-effective process, giving parties the lore quickly and more cheaply than they could what mediation is, but, as I have explained a ocess are as follows:
both of you will need to sign a short a participate). I have no authority to for	Binding: You have to agree to participate (and agreement showing that you have agreed to rce you to agree to anything. It is a non-binding ent that works for both of you, then we will end

the mediation. (If you do reach it an agreement, it will be enforceable under applicable law.) We can end the mediation at any time for whatever reason if you

want to do this.

- 2. The mediator is impartial: It is not our job to take sides. We listen to each of you and try to help you come up with an amicable resolution or settlement. We work hard to give all parties "equal time" to share their perspective on the dispute.
- 3. The mediator is not anyone's lawyer or counselor; you should seek legal advice if you need it: [I am a lawyer,] [Some of our mediators our lawyers] but a mediator will not give any party legal advice. We want you to have the tools you need to decide how to resolve your issues. I strongly encourage you to consult a lawyer about any legal issues or questions that you may have, and parties with attorneys representing them in a dispute almost always have those attorneys participate in the mediation. You should also consider any other professional advice that you may need, such as insurance coverage, counseling, etc.
- 4. Confidential: The agreement to mediate will require both sides to keep the mediation confidential, and many laws may protect the confidentiality of the mediation as well [be as strong as your state law permits; recall that federal law is not as clear].

You can read more about my [my o	rganization's] experience and background on
[my] [our] website at	[For mediation providers: Once you have
	th you information about the individual
mediators or mediators who will be	e assigned to your case. You may realize that you
know them or have some other conflict with using a particular mediator, and if you	
feel uncomfortable, we will offer yo	u alternative choices.] You can read more about
mediation at	[include links to videos that your
organization may have put together or other resources about the mediation	
process.]	
I [My organization] charge[s]	per hour [insert
appropriate fee schedule] for mediation sessions. [We charge a nominal fee of	
for consulting about th	ne mediation process.]1 These fees are shared by
the parties unless otherwise agreed	by both of you.
I would be happy to answer any add	ditional questions or address any concerns that
you may have about mediating this	these issues, and it could be helpful to hear a
little about your perspective on the issues. I could do this with you alone; it is often	

<sup>&</sup>lt;sup>1</sup> This may make it difficult to secure agreement. If it is important to seek compensation for your time in connection with the convening process, then that arrangement, for some nominal amount, should be made with the party that has called you to requ. Whatever the case, it is key to be absolutely clear about when fees will be charged and how much.

very helpful, though, to have a joint teleconference with the other parties about the mediation process to ensure we are aligned. I can set that up.<sup>2</sup>

If, however, you already know that you would like to mediate, [letter: I would ask that you let me know by sending me an email letting me know that and then filling out, signing and sending to me the attached intake form and agreement to mediate as soon as you can.][phone: I will send you an intake form and an agreement to mediate, and you should fill those out and return them to me as soon as you can. My contact information is below.]

[Name, address, email, telephone of mediator or mediation provider]

[Consider who should be copied?]

cc: Requesting Party
Recipient's counsel, if any

<sup>2</sup> Mediators need to be careful to distinguish conversations about whether or not to mediate from the beginning of the mediation itself. An agreement to mediate should be signed as soon as possible if the conversation is turning into a mediation.

# MODEL STANDARDS OF CONDUCT FOR MEDIATORS

# **AMERICAN ARBITRATION ASSOCIATION**

(ADOPTED SEPTEMBER 8, 2005)

# AMERICAN BAR ASSOCIATION

(APPROVED BY THE ABA HOUSE OF DELEGATES AUGUST 9, 2005)

# ASSOCIATION FOR CONFLICT RESOLUTION

(ADOPTED AUGUST 22, 2005)

**SEPTEMBER 2005** 

# The Model Standards of Conduct for Mediators 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<sup>1</sup>. A joint committee consisting of representatives from the same successor organizations revised the Model Standards in 2005.<sup>2</sup> Both the original 1994 version and the 2005 revision have been approved by each participating organization.<sup>3</sup>

### **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.

<sup>&</sup>lt;sup>1</sup> 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.

<sup>&</sup>lt;sup>2</sup> 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.

<sup>&</sup>lt;sup>3</sup> The 2005 version to the Model Standards were approved by the American Bar Association's House of Delegates on August 9, 2005, the Board of the Association of Conflict Resolution on August 22, 2005 and the Executive Committee of the American Arbitration Association on September 8, 2005.

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.

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.

#### 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 any participant's personal characteristics, background, values and beliefs, or performance at a mediation, or any other reason.
  - 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.

#### 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.

#### 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.

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

### 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.

#### 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.
  - 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.

### STANDARD IX. ADVANCEMENT OF MEDIATION PRACTICE

- A. A mediator should 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.

# REPORTER'S NOTES September 9, 2005

#### I. Introduction

During the 1992-94 period, representatives from the American Arbitration Association, the American Bar Association's Section of Dispute Resolution, and the Association for Conflict Resolution<sup>1</sup> developed the Model Standards of Conduct for Mediators (hereinafter referred to as 1994 Version). These Standards had three stated 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.

The 1994 Version has performed these functions with remarkable success. Two salient signs of such success are that various state programs adopted it in total or with slight variations as their guide for mediator conduct,<sup>2</sup> and multiple educational texts reference it in their discussion of ethical norms for mediators.<sup>3</sup>

During the past decade, however, the use of mediation has grown exponentially. State jurisdictions authorize referrals to mediation across a broad range of cases; Florida, as a single state, reported more than 100,000 cases being mediated in a given year. At the federal level, both district and circuit courts have experimented with various mediation initiatives. Delivery systems vary: some jurisdictions support the development of private marketplace mediator service delivery while others hire staff mediators in order to provide mediation services to all parties without additional cost to them. As use has grown, so have guidelines and rules; partly in response to the phenomenon that there are now more than 2200 statutory provisions or court rules shaping mediation's use, leaders in the field initiated efforts in the late 1990s that led to the development of the Uniform Mediation Act. And in contexts other than courts, such as peer mediation programs in middle schools and high schools, mediation systems in organizational contexts, and facilitated dialogue to resolve social policy conflicts, mediation's use has become prominent.

Given this expanded use, representatives from the original participating organizations believed it important to review the 1994 Version to assess whether changes were warranted. In September 2002, two designated representatives from each of the three original participating organizations convened (hereinafter referred to as Joint Committee) to initiate its review. These persons included:

<sup>1</sup> The Association for Conflict Resolution is the merged organization of three entities: the Academy of Family Mediators, the Conflict Resolution Education Network, and the Society of Professionals in Dispute Resolution. The Society of Professionals in Dispute Resolution was the third participating organization in the development of the 1994 Standards.

<sup>&</sup>lt;sup>2</sup> Such states include Alabama, Arkansas, Arizona, California, Georgia, Kansas, Louisiana, and Virginia.

<sup>&</sup>lt;sup>3</sup> Examples include Alfini, et al, <u>Mediation Theory and Practice</u>, Goldberg, Sander, et al, <u>Dispute</u> Resolution: <u>Negotiation</u>, <u>Mediation</u>, and <u>Other Processes</u>.

American Arbitration Association:

Eric P. Tuchmann John H. Wilkinson

American Bar Association, Section of Dispute Resolution R. Wayne Thorpe

Susan M. Yates

Association for Conflict Resolution Sharon B. Press Terrence T. Wheeler

# II. <u>Guiding Principles</u>

The members of the Joint Committee adopted the following principles to govern their work:

- A. The three-fold major functions of the 1994 Version 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 should remain unchanged.
- B. The Standards should retain their original function of serving as fundamental, basic ethical guidelines for persons mediating in all practice contexts while simultaneously recognizing that mediation practice in selected contexts may require additional standards in order to insure process integrity.
- C. The basic architecture of the 1994 Version should be retained. Where possible, the original concepts should be retained, but changes should be made to correct, clarify or respond to new developments in mediation practice.
- D Each Standard should target fundamental, ethical guidelines for mediators and exclude references to desirable behaviors or "best practices" in the statement of a Standard.
- E. The process for conducting the Joint Committee's review of the 1994 Version should be accessible by the various publics interested in and affected by the practice of mediation.
- F. Any changes to the Standards should be supported by a consensus of all Joint Committee members.

#### III. Joint Committee Schedule of Operations

The Joint Committee convened in September 2002 to begin its work. Members discussed basic governing principles to guide both procedural and substantive issues. It agreed to recruit a Reporter to assist it in its work.

At its meeting in March 2003 at the ABA's Section of Dispute Resolution Annual Conference in San Antonio, Texas, the Joint Committee adopted the following procedural guidelines:

- a) Convene a series of Joint Committee meetings during the 2003-04 period at which the Committee members, in executive session, would analyze the 1994 Version, consider input from outside the Joint Committee, raise questions or concerns about its current vitality, and, if appropriate, develop and adopt alternative format, language, and content;
- b) Conduct regular public sessions at the various conferences or meetings of the sponsoring organizations with the goal of eliciting comments and insights from practitioner audiences regarding appropriate questions to raise about the project's goals or particular elements of individual Standards; and
- c) Publish the Committee's work through a web site in order to elicit broad-based comments and reactions to the Joint Committee's activities.

In July 2003, the Joint Committee, through its Reporter, sent letters of invitation to more than 50 organizations in the dispute resolution field requesting them to designate a liaison to the Joint Committee. The Committee Reporter was charged with contacting these organizational liaisons in timely, regular ways to alert them to the development of the Joint Committee work. While participation and comments were desired from all persons affected by the Joint Committee's work, the Joint Committee believed that having organizations identify such liaison personnel would expedite communication.

The Joint Committee met in executive session in May 2003, October 2003, January 2004, April 2004, November 2004 and December 2004. These in-person sessions were accompanied by extensive conference call discussions. The Joint Committee conducted public forum about its work at the annual conferences of the ABA's Section of Dispute Resolution (March 2003 and April 2004) and the Association for Conflict Resolution (October 2003 and October 2004). It established its website, listing the 1994 version and inviting practitioner comment, in July 2003 (www.moritzlaw.osu.edu/dr).

The Joint Committee posted a proposed revised Model Standards (January 2004) in January 2004. It received public comments to the posting, both via website responses and the workshop discussion at the ABA's Section of Dispute Resolution Annual Meeting in April 2004. Throughout Summer 2004, the Joint Committee engaged in extensive conference call discussions to analyze and address the various issues raised by public comment. It posted Model Standards (September 2004) at the beginning of September; this version reflected substantial changes to the Model Standards (January

2004) document, including a significant proposed revision for the role and shape of the Reporter's Notes. At the time of the posting, the Joint Committee invited public comments for an approximate 60-day period, noting that it planned to meet in early November to begin consideration of its final draft. Public comments were received through early December 2004 and considered at the Joint Committee's final sessions on December 6-7, 2004. Through subsequent conference calls during December 2004, the Joint Committee developed its December 2004 draft, a draft designed as a final document, subject to consultation by Joint Committee members with their respective internal constituencies. The December 2004 draft and accompanying Reporter's Notes (January 17, 2005) were posted to the website for public information purposes. During the January-July, 2005 period, the Joint Committee examined targeted suggestions from constituent sources and developed the July 29, 2005 document.

The Joint Committee agreed unanimously to recommend to its respective organizations for appropriate adoption the Model Standards of Conduct (July 2005); for reasons explained below in Footnote 4, the document is referred to throughout these Reporter's Notes as Model Standards (September 2005)).<sup>4</sup>

# IV. Format of Model Standards (September 2005)

The Joint Committee has recommended several significant General changes. organizational format changes to the 1994 Version. The Joint Committee, with the aid of sustained, thoughtful public comments, concluded that the 1994 Version could be improved by adopting the following principles: (1) separate the statement of the Standard's title from a statement of the Standard itself; (2) divide the statement of the Standard into enumerated paragraphs and sub-paragraphs, thereby facilitating clarity of exposition and public discussion of distinct, albeit related concepts; (3) eliminate the ambiguous status of the "hanging paragraphs" that follow the statement of the Standard itself by drafting the document so that all entries provide meaningful guidance for mediator conduct; (4) distinguish the level of guidance provided to the mediator by the targeted use of the verbs, "shall" and "should," thereby eliminating the need for the categorical distinction between the statement of the Standard and "Comments;" (5) shape the document so that the language of the Standards guides the mediator's conduct rather than the conduct of other mediation participants; and (6) shape the document to provide guidance for mediator conduct in situations when the operation of two or more Standards might conflict with one another.

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<sup>&</sup>lt;sup>4</sup> The Joint Committee formatted the first page of the Model Standards (September 2005) so as to reflect an effective date. It agreed that the effective date would be that date on which, chronologically, the last of the three original participating organizations adopts the Model Standards. The Joint Committee instructed its Reporter that, once an effective date was established, he should revise the Reporter's Notes to change all references to "Model Standards (July 2005)" to reflect that adoption date. As noted on the cover page for the Standards, the adoption dates by the respective organizations were: American Arbitration Association (September 8, 2005), the American Bar Association House of Delegates (August 9, 2005), and the Association for Conflict Resolution (August 22, 2005).

While believing that the 1994 Version could be improved in these ways, the Joint Committee wants to state publicly its collective admiration and respect for the efforts of those individuals who crafted the 1994 Version. The quality of their work is confirmed in multiple ways, including the numbers of states that have adopted the 1994 Version to govern its court-annexed mediation programs and the number of textbooks that cite it in discussions of mediator ethics. As the Joint Committee considered using alternative phrases and words in various Standards and Comments, it routinely returned to admiring the insight contained in the original Standards. And perhaps most significantly, the Joint Committee, after canvassing multiple codes and standards operating in courts and programs, enthusiastically confirmed that the drafters of the 1994 Version had served the public elegantly by providing a comprehensive, useable document organized around nine Standards. The Joint Committee has retained that basic architecture throughout its revisions.

Changes in format to the Model of Standards of Conduct for Mediators. The Joint Committee attempted to incorporate and implement the above-noted principles throughout its multiple drafts. In the first posted revision, the Model Standards (January 2004) embraced the principles of having a title for each Standard, stating the Standard in declarative sentences targeted exclusively at guiding mediator conduct, enumerating them in appropriately separated sentences, and distinguishing the type of mediator guidance offered by a Standard or Comment by the use of "shall" and "should" respectively. Second, in terms of format, the Model Standards (January 2004) used footnotes to try to provide several types of information: a) a definition of relevant terms; (b) examples of how a particular Standard or comment might operate at cross purposes with another Standard in a particular setting; (c) general comments regarding the significance of particular Standards, using verbatim the language of the 1994 Version; and (d) clarification, by way of example, of new elements being added to the 1994 Version. Third, the Model Standards (January 2004) suggested that the Reporter's Notes would be an official source to summarize or clarify matters relevant to the statement of the Model Standards.

Public comments to the Model Standards (January 2004) applauded the Joint Committee's effort to organize crisply the statement of the Standard and the Comment section. However, many noted that the use of footnotes was problematic: format-wise, it instantly prompted a reader to assess what status to accord them: were they binding? Were they of the same significance as a statement of a Standard or Comment? And, in the final analysis, what would be their relationship to an expanded version of the Reporter's Notes? Further, given that one of the Joint Committee's guiding principles was that substantive changes to the 1994 Version would be made only if there were evidence that current practice or policies warranted such changes, some charged that the footnotes, even in combination with enriched Reporter's Notes, did not systematically deliver on that promise. Finally, several persons suggested that the content or statement of particular footnotes needed clarification.

The Joint Committee, in its deliberations during the April-August 2004 period, found persuasive the public comments that argued that the use of footnotes created complexity

and confusion rather than clarity. Accordingly, the Model Standards (September 2004), with two exceptions, contained no footnotes; those exceptions addressed two topics that the Joint Committee thought important to reflect in the document itself: first, that no participating organization had yet to consider and adopt the Model Standards (September 2004); and second, that the use of the term, 'mediator', in the Standards was to be understood to apply to persons operating in a co-mediator model as well as to those working in a solo capacity. In eliminating the footnotes, however, the Joint Committee proposed having the Reporter's Notes serve as the legislative history regarding the development and application of the Model Standards of Conduct for Mediators. Accordingly, it directed its Reporter to format and prepare the Reporter's Notes so that the Notes contained a discussion of the following elements: the concerns and rationale the Joint Committee found persuasive for offering substantive changes to the 1994 Version; examples of application questions that the footnotes in the Model Standards (January 2004) were designed to address; and a recounting, at least in a general way, of the types of concerns and comments raised by public participants and the manner in which the Joint Committee addressed those comments in its current draft.

In response to public and organizational comments to the Model Standards (September 2004), the Committee made three significant changes in developing the December 2004 draft. First, in response to public concerns about there being multiple documents (i.e. the Model Standards and the Reporter Notes), the Joint Committee chose to develop a format for the Standards such that the document itself constituted a complete statement. The Joint Committee concluded that it would not try to integrate or weave the Reporter's Notes or any other commentary into the final statement of the Model Standards nor have the Reporter's Notes viewed as an independent but necessary component of the publication of the Standards for which formal adoption by participating organizations would be sought. Each Joint Committee member agrees, though, that these Reporter Notes accurately reflect the commentary, history and deliberations of the Revision process and hopes that they serve their intended educational role.

Second, the Joint Committee chose to eliminate organizationally the distinction between Standards and Comments, opting to address through clear language in each entry the precise guidance provided to a mediator.

Finally, the Joint Committee included explicit provisions directed to considerations of interpretative construction.

# V. Analysis of Model of Standards of Conduct for Mediators (September 2005).

#### A. Preamble

The Model Standards (September 2005) amends the organizational format of the 1994 Version. It identifies an effective date for the adoption of the Standards by participating organizations, begins with a paragraph describing the historical context of the document

and its revision, and substitutes a *Preamble* and *Note on Construction* for the "Introductory Note" and "Preface."

The Joint Committee determined that the Model Standards, to be most effective, must operate as a single, self-contained, defining document. As a result, while it noted that that the Reporter's Notes could serve a valuable educational function for the public regarding the rationale for various changes, the Joint Committee concluded that its prior consideration to have the Reporter's Notes serve an integral role as an interpretative resource for the Standards was misdirected. Further, the Joint Committee determined that the distinction between a statement of a "Standard" and the "Comments" relevant to that Standard was ultimately not helpful; although this distinction occurs in the 1994 Version and had been retained by the Joint Committee in both the Model Standards (January 2004) and Model Standards (September 2004), the Joint Committee decided that the fundamental difference for guiding mediator conduct contained in this categorical distinction was more effectively communicated in clear language for each entry. To promote clarity, the Model Standards (September 2005) contains a new section entitled Note on Construction with material that explains the level of mediator guidance provided by each entry. With these significant format changes, the Joint Committee believes the Model Standards (September 2005) can operate effectively as a self-contained document.

In the *Preamble*, the Model Standards (September 2005) revises the definition of mediation in order to make it consistent with changes in Standard I that recognize that party self-determination operates over not just voluntary decision-making as to outcomes but to multiple process components as well. Since the publication of the 1994 Version, there has been significant academic and policy discussion focused on mediation style or theory. In particular, the terms, facilitative and evaluative, to describe mediator orientations have taken on particular meanings in the popular literature and approaches to mediation differently conceptualized in such frameworks as problem-solving or transformative have been trenchantly analyzed. The revised definition of mediation is not designed to exclude any mediation style or approach consistent with Standard I's commitment to support and respect the parties' decision-making roles in the process.

#### B. Note on Construction

This section is designed to provide clarity to the interpretation and application of the Standards, both individually and collectively.

The Model Standards (September 2005) retain the 9-Standard architecture of the 1994 Version. The *Note* indicates that the Standards are to be read and construed in their entirety. The interpretative principle that mandates that each Standard be read and interpreted in such a manner as to promote consistency with all other Standards is the presumed operative principle guiding the drafting of the Model Standards (September 2005).

By eliminating the structural framework that led to using "shall" and "should" in the statement of the Standard and Comment respectively, the Joint Committee believed it

important to define these terms, given the purposes and goals of these Standards. The definition of 'shall' prescribes mandatory mediator conduct. The definition of 'should', more sharply than conventional understanding might otherwise suggest, stipulates that the recommended guidance to a mediator, though not mandated, can be discarded only for compelling reasons. The combined message is clear: the Standards, in their various statements, provide strong guidance for mediator conduct; while not presuming to be a "rule-book" that anticipates and answers every possibility, the Standards provide meaningful guidance for most situations and the burden transfers to an individual mediator to justify a departure from its prescriptions.

While some sections of the Model Standards (September 2005), such as Standards III (A-F) and IV (B), make reference to a time frame for a mediation (using language such as "during and after a mediation,") the *Note on Construction* notes clearly that the Model Standards (September 2005) do not try to provide precise definitions for the beginning and ending of a mediation. The Joint Committee recognizes that such definitional precision might be important in some contexts, such as where court rules, statutes or other regulations govern a mediation; however, in other settings, the exact beginning or end of a mediation is not always clear, yet the Model Standards (September 2005) are designed to guide mediator conduct even in such contexts of ambiguity.

The *Note* explicitly addresses the fact that a mediator's conduct may be affected by applicable law, court rules, regulations, other applicable professional rules, mediation rules to which the parties have agreed, and agreement of the parties, some of which may conflict with and take precedence over compliance with these Standards. This topic is noted here for both format and substantive reasons. Organizationally, it became clumsy to represent this conflict throughout the document with such phrases as "unless otherwise required by law;" while that phrase has been used once in the statement of a provision of Standard V dealing with Confidentiality (a significantly law-regulated area of mediator activity), the Joint Committee believed it best to state this basic proposition at the beginning of the document so that it would operate as a presumed understanding throughout.

Substantively, the Joint Committee, in response to comments, believed it important to clarify for a mediator what posture he or she should adopt when confronted with such a conflict. The basic principle, while straightforward, requires elaboration. The principle that guides mediator conduct in such contexts is: in the event of a conflict between a provision of a Standard and one or more external sources identified in the *Note*, a mediator ought to conduct oneself in a manner that retains and remains faithful to as much of the spirit and intent of the affected Standard, and all other Standards, as is possible. The following example is illustrative: Assume that a court orders a party to mediation; one party's counsel telephones the mediator and states that neither the lawyer nor client plans to attend, believing any such session to be worthless for this case. The mediator reminds the attorney of the court directive; indeed, in some jurisdictions, since the mediator may even have a duty to report participant non-attendance to the referring court, the mediator may remind the attorney of that matter, too. Here is a conflict between a court rule and Standard I: a mediator cannot consistently adhere to the court

rule and simultaneously honor the prescription in Standard I that a mediator conduct the mediation based on party self-determination with regard to "...participation in [a mediation.]" When a mediator in this situation recognizes that the court rule takes precedence over this provision of Standard I, a mediator still has an ethical responsibility to conduct that mediation in a manner consistent with all other aspects of Standard I – e.g. respecting and promoting self-determination with respect to process design and outcomes – as well as consistent with all other Standards. The current language of the penultimate paragraph reflects the Joint Committee's decision that a mediator must act in various practice contexts in a manner that retains and advances as much of the spirit and intent of the Standards as is possible.

The Joint Committee has consistently noted that the Standards can be used in multiple ways by individuals, programs, or organizations, including requiring compliance with these Standards as a condition for continuing membership in a program or organization. The Joint Committee, however, has added a final paragraph under *Note* to clarify for mediators that courts or other entities may use these Standards to establish the expected level of care for mediator conduct.

# C. Standard I: Self-Determination.

There are two significant changes proposed to the 1994 Version. First, the 1994 Version focuses exclusively on exercising self-determination with respect to outcome; it is silent with regard to such matters as mediator selection, designing procedural aspects of the mediation process to suit individual needs, and choosing whether to participate in or withdraw from the process. The Model Standards (September 2005) extends the scope of self-determination to these other areas.

Second, the 1994 Version does not address the question of the interplay among the Standards. In some instances, the interplay is consistent but the mediator must be cognizant of it. For example, while parties can exercise self-determination in the selection of their mediator, a mediator must consider *Standard III: Conflicts of Interests* and *Standard IV: Competence* when deciding whether to accept the invitation to serve. Alternatively, the interplay among Standards may result in a conflict; a mediator, for example, may feel pulled in conflicting directions when the mediator, duty-bound to support party self-determination (*Standard I*), recognizes that parties are trying to design a process that is not mediation but want to call it mediation to gain confidentiality protections, thereby undermining the mediator's obligation to sustain a quality process (*Standard VI*). Standard I(A)(1) and I(B) explicitly recognize this potential for conflict and indicates to the mediator that sustaining a quality process places limits on the extent to which party autonomy, external influences, and mediator self-interest should shape participant conduct.

Standard I (B) directly addresses the concern that mediators may undermine party selfdetermination or themselves experience conflicts of interest as a result of pressure or incentives generated by court personnel, program administrators, provider organizations, the media, or other outside influences. Many factors can operate this way, intended or not: for instance, a program administrator might suggest to one mediator that more cases shall be assigned to another mediator because that person "always gets a settlement," or a news media writer might report settlement talks as having stalled in a way that might possibly harm the reputation of the identified mediator. The result is that such pressures or influences prompt the mediator to engage in conduct to override party self-determination in an effort to gain resolution. The Joint Committee reaffirms the Comment in the 1994 Version on this point that the mediator's commitment to the parties and process must remain steadfast and a mediator must not coerce parties to settle; the language of the Model Standards (September 2005) has been sharpened to eliminate any ambiguity regarding that duty.

Several public comments raised concerns that the language of the 1994 Version stating, "Self-determination is the fundamental principle of mediation" had not been retained. The Joint Committee believes that the expanded statement of Standard I, together with the definition of mediation appearing in the Preamble, appropriately reaffirms the central responsibility that a mediator has to actively support party self-determination, prohibits conflict of interest issues from undermining a mediator's commitment to promoting party self-determination (I(B)), yet recognizes, as noted above, that Standards may conflict.

Other public comments suggested that the Standard should contain language that requires the mediator to make certain that the parties made informed decisions; given the significant controversy about whether and how a mediator might insure that a party's decisions are suitably informed, the Joint Committee reaffirmed retaining the language of the 1994 Version as I (B). Additionally, several public comments noted that parties can be effectively ordered to mediation by a judge, thereby rendering self-determination as to process irrelevant. The Joint Committee addresses this dynamic in the *Preamble* in its discussion of the potential conflict between the operation of the Model Standards (September 2005) and other sources that might govern an individual mediator's conduct. Finally, some public comments suggested that Standard I should contain guidance to a mediator regarding his or her duty to report "good faith" participation by various mediation participants. To the degree that might be required by other rules governing mediator behavior in a particular setting, the Joint Committee addresses this topic in the Note on Construction's statement regarding potential conflicts. However, in Standard V (A) (2) on confidentiality, the Joint Committee explicitly supports the position widely adopted in practice and program rules that a mediator can override confidentiality, if required, for only two purposes: to report whether parties appeared at a scheduled mediation or to report whether the parties reached a resolution; the Joint Committee rejected overriding the confidentiality requirement for any other purpose.

# D. Standard II: Impartiality

The Joint Committee believes that several developments of the past decade's growth in mediation practice warrant changes to the 1994 Version of Standard II. First, with the expanded growth of private sector mediation practices, the range of business practices

and practices regarding fees raises concerns about the mediator being perceived as partial. Second, with the remarkable diversity of participants in mediation, challenges have arisen with regard to sustaining a mediator's impartiality while simultaneously respecting practices grounded in different cultures.

The Model Standards (September 2005) addresses these concerns in the following way. In Standard II (A), the Joint Committee reaffirms the central role of the need for a mediator to be impartial; disclosure of potential conflicts of interests, and parties choosing to proceed following such disclosure, is a separate consideration addressed in Standard III.

Second, the propriety and impact of fee arrangements, including success fees or practices involving unequal payment of the mediator's fee by the parties, affects several Standards; the Joint Committee chose to address these matters in *Standard VIII: Fees and Other Charges*.

In response to insightful public comment, the Joint Committee revised the language of what is now Standard II (B)(1) to reflect that the mediator must not act in a manner that favors or prejudices any mediation participant based on the personal characteristics, background, values and beliefs, or performance at a mediation of that individual; the proscription governs the mediator's conduct towards any participant, not just the parties. While the Standard delineates recognizable elements that operate to undermine mediator impartiality, the list is not exhaustive. Additionally, the Joint Committee decided to strengthen the 1994 Version by shaping the Standards both to guide the conduct of mediators rather than other mediation participants and to provide guidance for mediator conduct through the defined use of "shall" and "should;" by so doing, the Joint Committee agreed that the phrase, "should guard against," that is used in the 1994 Version in this section was not consistent with such changes.

Some public comments urged the Joint Committee to adopt language that required the mediator, when his or her ability to remain impartial was undermined, to withdraw from the mediation "without harming any party's interests." Individual members of the Joint Committee questioned whether withdrawal without harm to at least some interests of one or more parties is always possible, even though all agreed that the duty to withdraw in these circumstances is clear. The Joint Committee believes that the manner of withdrawal is a matter of "best practices;" further, throughout the Standards, the Joint Committee has declined to insert language that requires a mediator to insure a particular outcome.

Finally, potential challenges to a mediator's impartiality in private sector practice arise with remarkable frequency. For example, if all parties, their representatives and the mediator are immersed in discussions in an all-day mediation and they decide to order food for lunch, does the mediator violate Standard II if the lawyer for one of the parties offers to pay for everyone's lunch? If a mediator accepts a small gift from a grateful party following a successful mediation, must the mediator return it on pain of violating the impartiality requirement? And these matters become more complex when practices

grounded in cultural traditions surface: if the cultural tradition of one party prompts that individual to bring a ceremonial gift to the mediator in order to reaffirm the seriousness of the talks and the well-wishes that the talks proceed constructively, can the mediator accept it? The Joint Committee supports the individual mediator, whether in a private practice setting or government or organizational program setting, responding sensitively and comfortably to such contemporary practices, but with the caveat that all such conduct be grounded in a sincere assessment as to whether accepting such benefits or giving such gifts will raise questions as to that mediator's actual or perceived impartiality; by using the term "de minimis gifts or incidental items," the Standard signals to the practicing mediator that the threshold for questioning whether a mediator is no longer impartial for these types of matters is low.

There were several public comments expressing concern that the following language from the 1994 Version's Comment Section of Standard II had not been retained in the posted Model Standards (January 2004):

"When mediators are appointed by a court or institution, the appointing agency shall make reasonable efforts to ensure that mediators serve impartially."

Comparable comments were received regarding the role of program administrators in government or organizational mediation programs. The Joint Committee appreciates the conviction expressed by program administrators operating in court or other institutional settings that the cited language serves a critically important role in assisting program administrators to advance quality mediation practice. However, one goal of the Model Standards (September 2005) is to have all language focus sharply and exclusively on guiding mediator conduct; for that reason, the Joint Committee has consistently resisted suggestions that it develop language that recognized and extended coverage of the Standards to administrators of mediation programs in court, administrative and organizational contexts. That is not to suggest, however, that the Standards will not influence the conduct of these other participants, indirectly or directly; for instance, the Joint Committee explicitly addresses the concerns raised by these comments in Standard I (B): Self-Determination where the language of the Standard reinforces the mediator's duty to the parties and process when responding to pressure being exerted by such outside influences as court personnel or provider organizations.

# E. Standard III: Conflicts of Interest

Standard III (A) defines a conflict of interest as a dealing or relationship that undermines a mediator's impartiality; while Standard II and III are explicitly connected in a fundamental manner, the Joint Committee felt it important to retain the distinction in order to emphasize that a mediator's impartiality is central to the mediation process and that mediator conduct that raises questions of conflicts of interest serves to undermine public or party confidence in the central integrity of the process.

Standard III (A) notes that a conflict of interest can arise from multiple sources in multiple time dimensions. A mediator must canvass this extensive range of possible disqualifying activities, attuned to the notion that his or her immediate duty is to disclose information that might create a possible conflict of interest; if parties, with knowledge of the relationship, consent to that mediator's service, then the mediator, pursuant to Standard I, could proceed. However, the Model Standards (September 2005) retains content and language of the 1994 Version that notes that if the conflict of interest casts serious doubts on process integrity, then the mediator shall decline to proceed despite the preferences of the parties.

Public comment requested clarification of the interplay between such sections as Standard III (C) or III (D) with Standard II (C): Impartiality. As is referenced in the Reporter's Notes in *Note on Construction*, the interpretative principle mandates that each Standard be read in a manner that promotes consistency. Applying that principle, in Standard II (C), the Joint Committee supports the posture that a mediator shall not conduct a mediation if he or she is unable to conduct it in an impartial manner; even if participants, under Standard III (C) or III (D) gave consent to the mediator to proceed after a mediator disclosed an actual or potential conflict of interest, Standard II (C) prohibits the mediator from proceeding.

Some Committee members were disturbed to hear reported that a common practice among some mediators is for the mediator not to disclose with all mediation parties and their representatives that the mediator has served previously as a mediator in situations involving some of the mediation parties or their representatives; the language of III (A) seriously questions the integrity of such a practice.

Standard III (B) explicitly acknowledges that how one conducts a conflicts check varies by practice context. For a complex case that comes to a mediator through his or her 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.

In drafting Standard III (C), public comments highlighted one particular source of potential conflict as being that situation in which a significant portion of a mediator's work, particularly when compensated, comes from a single source; these commentators suggested that that situation be explicitly addressed. The Joint Committee, as individuals, agreed that such a situation creates a serious potential conflict and that there would be a duty minimally to disclose that situation. However, as other public comments noted, there are multiple examples of relationships between one party and a mediator that give rise to the same concern about conflicts of interest; if one attempted to catalogue a comprehensive list, then failure (through oversight) to include some relationship might be seen, incorrectly, to license that conduct. Therefore, the Joint Committee developed language of a general nature.

In performing the mediator's role, an individual displays multiple analytical and interpersonal skills; therefore, it is not surprising that a mediation participant who witnesses such talent might consider employing that mediator again. If a mediation participant, be it a party, party representative, witness or some other participant wants to employ the individual mediator in a subsequent mediation, or in another role (such as a personal lawyer, therapist, or a consultant to their business), then the individual serving as mediator must make certain that entering into such a new relationship does not cast doubt about the integrity of the mediation process. The Model Standards (January 2004) contained an explicit enumeration (Paragraph C) that prohibited a mediator from soliciting any type of future professional services; in response to public comments critical of the broad, absolutist language of that paragraph, the Joint Committee deleted that provision in the Model Standards (September 2004) and revised the language of what was then Comment 3 to address this matter. The final language appears in Model Standards (September 2005) as Standard III (F). Unlike some other Codes, Standard III (F) does not impose rigid time lines to regulate the development of such relationships but does suggest that the amount of time that has elapsed is a factor to consider.

# F. Standard IV: Competence

Mediators operate in many contexts and reflect a broad range of backgrounds, trainings, and competencies. The Model Standards (September 2005) retains the commitment expressed in the 1994 Version that the Standards not create artificial or arbitrary barriers to serve the public as a mediator. But to promote public confidence in the integrity and usefulness of the process and to protect the members of the public, an individual representing himself or herself as a mediator must be committed to serving only in those situations for which he or she possesses the basic competency to assist.

The Joint Committee, Standard IV (A), changes the language of the 1994 Version to use the term, 'competence' in place of 'qualification.' In elaborating on IV (A), Standard IV (A) (1) indicates that such elements as training, experience in mediation, and cultural understandings are often necessary in order to provide effective service. But the Joint Committee understands its language to explicitly reject two notions with regard to the operations of this Standard: first, that possessing particular educational degrees is an absolute requirement to establish mediator competency, and second, that the list of desirable competencies means that each competency is required for effective service in every mediation.

Standard IV (B) recognizes the situation in which a mediator, upon agreeing to serve, learns during the course of the discussions that the matters are more complex than originally anticipated and beyond his or her competency. In such a situation, Standard IV (B) imposes a duty on that mediator to take affirmative steps with the parties to address the situation and make appropriate arrangements for serving them (perhaps through hiring co-mediators with relevant competencies or the selection of an alternative mediator).

Public comments on the Model Standards (January 2004) strongly supported language that reaffirmed, as a central feature of Standard IV, that training and experience are the necessary and sufficient conditions for service as a mediator. The Joint Committee believes that its current language reflects that commitment and that it appropriately appears in Standard IV (A) (1). The Joint Committee also wanted to emphasize that mediator competency also includes cultural understandings, a dimension that the 1994 Version does not address. Additional public comments suggested that the language of the Standards include reference to an individual's meeting the qualification requirements set forth by relevant state statutes; the Joint Committee believed that its statements in the *Note on Construction* regarding the relationship between the Standards and state law addressed this matter, together with its *Preamble* statement that the Standards are considered as fundamental ethical guidelines; particular programs or practice areas might require additional elements for service.

Standard IV (C) mandates that a mediator not conduct the mediation if she or he is impaired by drugs, alcohol, medication or otherwise. If a mediator has the ability to correct this impairment, then she or he can initiate or continue service.

# G. Standard V: Confidentiality

One of the most significant developments surrounding the practice of mediation that has occurred since the adoption of the 1994 Version has been the development of the Uniform Mediation Act (2003). That undertaking significantly enhanced professional conversation and awareness of the policy goals advanced by the presumption that parties should determine their own rules regarding confidentiality and 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 focused significantly 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 confidentiality policy goals of the Uniform Mediation Act, it is not designed to match its substantive provisions and nuances in every dimension.

Standard V directs mediator conduct in two ways. First, it imposes a duty on the mediator not to share with others information obtained as a result of serving as a mediator. Even if the parties agree that the mediator shall disclose it (pursuant to Standard I (A)), Standard V (A) (1) states that the mediator may do so but is not required to do so. Second, Standard V imposes a duty on the mediator to promote participant understanding of the extent to which information shared and comments made for purposes of mediation are confidential. What is crucial to the effective operation of the Standard – and hence to the integrity of the process – is that all participants to the mediation, including the mediator, actively seek to understand the nature and extent of the confidential status of communications made during the mediation. The current language promotes that goal.

Some public comments to prior versions urged the Joint Committee to adopt language that explicitly linked or tracked the Standard to the requirements of state or Federal law; as noted above in a related matter, the Joint Committee placed references in the *Note on Construction* to the interplay between the Standards and relevant legal guidelines, in part to enhance the fluidity of the language of the Standards and in some measure to resist a perceived tendency to over regulate mediation practice. The Model Standards (September 2005) retains, in both V (A) and V (A) (2), references to recognized exceptions to the confidentiality reach.

Standard V(A)(3) tracks the concept of the 1994 Version in which its drafters sought to insure that the Confidentiality Standard did not prohibit monitoring, research, evaluation or education of mediation by responsible persons. However, since the language of the Standards is targeted to guide mediator conduct, the language of the 1994 Version required modification. Further, when reflecting on the nature of how the teaching, research and evaluation of mediation could appropriately go forward, the Joint Committee thought it appropriate to adopt a two-fold goal: first, protect the identity of individual participants, so that a mediator participating in teaching, research and evaluation could discuss aspects of the case but doing so in a way that does not readily enable people to discern the identities of the parties; second, to permit teaching, research and evaluation to proceed without imposing undue requirements for gaining party consent to every initiative – for example, if a court system sought to evaluate its mediation program, it would be an undue requirement to insist that the evaluator affirmatively obtain from every party or party representative to a mediation his or her consent to have reported such elements as the length of a mediation session.

Some public comments suggested that a mediator, when conducting a caucus, can appropriately place the responsibility on the party with whom she or he is caucusing to flag each element of information that the party wishes the mediator to keep confidential. In Standard V (B), the Joint Committee rejects that approach to the degree that it is not consistent with securing meaningful and timely party consent. At a practice level, the Joint Committee notes that some mediators advise the participants that the mediator will keep confidential those matters disclosed by a participant if the participant so requests; otherwise, the mediator shall treat comments made in the caucus as being ones that he or she could use in subsequent caucuses if doing so, in the mediator's judgment, would help advance discussion. By contrast, the practice of other mediators when conducting a caucus is to advise the participants that a mediator will treat all matters shared with him or her as confidential but shall ask at the end of a particular caucus whether the mediator has the participant's consent to use any or all of that developed information in subsequent caucuses. Whichever practice is adopted by a mediator, Standard V (B) affirms that it is a mediator's duty to insure that party consent to the approach is known, meaningful and timely.

Standard V (C) targets a mediator's responsibility to make certain that the parties understand the extent to which they, not the mediator, will maintain confidentiality of information that surface in mediation. Section V (D) is a provision that applies equally to V (A-C); while some might believe it implicit in each of the preceding paragraphs of the

Standards, the Joint Committee thought it important to emphasize, even if somewhat redundant, the need for participant understanding of the confidentiality guidelines governing the conversation.

## H. Standard VI: Quality of the Process

The 1994 Version sets forth in the statement of the Standard and in its "hanging paragraph" a series of distinct, concrete ways in which a mediator could act to advance a quality process. The Model Standards (September 2005) captures those elements in its statement of VI(A), incorporating from public comment a revision that requires a mediator to conduct a process that advances procedural fairness, not, as in the Model Standards (January 2004), "process fairness."

Public comments to both the Model Standards (January 2004) and the Model Standards (September 2004), combined with further Joint Committee discussion, resulted in several changes reflected in the Model Standards (September 2005). In summary form, those changes include:

- 1. Comment 1 from the Model Standards (January 2004) read as follows: "A mediator should conduct 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." That comment has been deleted for two reasons: first, the Model Standards (September 2005) focus on guiding mediator behavior and not that of other participants in the mediation process; second, the Model Standards (September 2005) capture the goal of preventing such participant behavior in provisions such as VI (A) (6).
- 2. Standard VI (A) (1-9) is sequenced to reflect the presumptive order in which a mediator might confront these considerations in practice.
- 3. Standard VI (A) (4) reflects the nuanced environment in which mediation occurs. The language of Standard VI(A)(4) prohibits a mediator from knowingly misrepresenting a material fact or circumstance to a mediation participant while it acknowledges that resolving matters in mediation is not always predicated on there having been complete honesty and candor among those present. To state the matter differently, while mediation participants might engage in negotiating tactics such as bluffing or exaggerating that are designed to deceive other parties as to their acceptable positions, a mediator must not knowingly misrepresent a material fact or circumstance in order to advance settlement discussions.
- 4. Standard VI (A) (5-8) reflects an effort to reorganize and distinguish more sharply among related but importantly different directions to the mediator. VI (A)(5) announces that the mediator's role differs substantially from that of other professional roles; the goal is to distinguish between a mediator's role and such other roles as being a lawyer, mental health counselor, and the like. Yet, (A)(5)

also recognizes that the insights and training the mediator draws upon to assist parties in mediation might simultaneously constitute an important element of enabling a mediator to be competent and effective to serve the parties in that setting and be drawn from the mediator's training and experience in those other professional roles. So, the language of VI (A) (5) recognizes the differing roles that a mediator as an individual assumes in his or her life and then supports the mediator sharing information that he or she is qualified by training or experience to provide only if it is done in a manner consistent with other Standards, most notably promoting party self-determination and sustaining mediator impartiality.

Standard VI (A) (6) makes it explicit that a mediator cannot engage in a ruse of labeling a dispute resolution process as "mediation" in order to gain its benefits (such as confidentiality protections) when it is apparent that the participants have designed and participated in some other form of dispute resolution. (A)(7), as a stand-alone entry, notes that it certainly is plausible for a mediator to recommend, when appropriate, that the parties consider resolving their dispute through some other third-party process. This guideline makes at least two presumptions: first, that a mediator might identify such an option when it seems an appropriate track to pursue as a matter of process choice (i.e. "fitting the forum to the fuss") or after mediation efforts to resolve the issue(s) have not been successful in resolving all issues to each party's satisfaction; and second, that the mediator is qualified by training or experience to explain to the parties, if requested, how these various processes operate. Finally, (A) (8) clarifies that a mediator shall not undertake in the same matter that he or she is mediating a different intervener role (such as those described in (A)(7) without party consent, without explaining to the parties and their representatives the implications of changing processes (e.g. a third-party decision-maker might have to make decisions regarding participant credibility that was not necessary in a mediation process), and without being cognizant that undertaking a new role might be governed by standards governing other thirdparty professions, such as a Code of Ethics for Arbitrators.

5. Standard VI (A)(9) reflects revised language to the 1994 Version by targeting guidance to the mediator more sharply: it guides a mediator who confronts mediation participants using mediation to further criminal conduct, not simply illegal conduct, to take appropriate steps to deter them from accomplishing that goal. Several public comments suggested that the mediator's duty in such a situation was to affirmatively report such conduct to appropriate legal authorities. The Joint Committee rejected that suggestion for two reasons. First, , the subtly of such matters – including there being multi-issue cases in which only one issue raised a specter of criminal conduct – requires that a mediator be firm but flexible in addressing such a situation; second, confidentiality laws or agreements may prevent it, such that unless there were an exception in the confidentiality agreement for this situation or a mediator had a duty to report such conduct, a mediator might expose himself or herself to liability by reporting such conduct.

- 6. Standard VI (A) (10) reflects new language that addresses the situation involving a mediator's obligation when conducting a mediation with persons with recognized disabilities. The Joint Committee recognizes that the language of Comment 8 in its Model Standards (January 2004), while included by oversight but actually reflecting the language contained in the 1994 Version, was completely unacceptable. Public comments thoughtfully suggested a variety of possible clauses to address this situation; Comment 8 in the Model Standards (September 2004) reflected the Joint Committee's judgment as to the best expression of the multiple commitments involved in such a situation and it received positive endorsement from several public stakeholders. That September language remains unchanged and appears as (A) (10).
- 7. The Joint Committee believes that developments in practice regarding the mediation of cases in which allegations of domestic abuse arise must be addressed in any revision to the 1994 Version. Public comments strongly endorsed amending the 1994 Version to address this topic and Standard VI (B) reflects that effort. The Joint Committee understands the term, "domestic abuse," to apply to acts of both physical violence and psychological coercion among persons in a domestic relationship. Standard VI (B) also provides guidance to mediators for situations in which mediation participants in non-domestic relationships have engaged in acts of violence towards one another. Mediator guidance for addressing challenges posed by the threat of violent conduct among participants is reinforced through such other provisions as Standards I and VI (A).

Some public comments suggested that any provision targeted at mediations involving domestic abuse should contain a detailed prescription regarding the manner in which the mediator should screen participants, the requisite training to serve as a mediator in such situations, the requirement to report such matters to appropriate agencies if one is a mandatory reporter, and the like; the Joint Committee chose to retain the targeted, albeit general language of VI (B), with the notion that Standards for particular programs might choose to build in more elaborate requirements.

# I. Standard VII: Advertising and Solicitation

With increased private sector activity in the provision of mediation services, the Joint Committee believed that the 1994 Version required modest amendment to provide guidance to mediators in a more complex, technological world. The language of Standard VII (A) addresses the complexity that confronts a mediator who seeks to communicate effectively the nature of his or her services as a mediator and his or her expertise without making representations that are inconsistent with such principles as party self-determination and mediator impartiality. Standard VII (A) (1) reaffirms the 1994 Version's commitment that a mediator must not include any promise as to outcome.

Standard VII (A) (2) addresses the concern that a mediator representing to the public that he or she is a "certified" mediator might be misunderstood by the public as suggesting that the mediator has met a more stringent level of selectivity than is otherwise the case. The 1994 Version addresses this challenge as well. Some governmental entities, including courts or administrative agencies, and private sector organizations have developed, publicized procedures through which an individual mediator can obtain status as having been "certified" to be on that entity's mediator roster. If a person has been granted that status by a governmental entity or private organization, then he or she is free to so advertise it. The Joint Committee notes, however, that it would mislead the public – and be prohibited by VII (A)(2) – were an individual to complete a privately-offered mediator training program, receive a "Certificate" that states that he or she has successfully completed that course, and then advertise that he or she is a "Certified" mediator.

Standard VII (B) addresses the increasing challenge of blending appropriate communication and marketing of a mediator's services without soliciting business in a manner that results in compromising that individual's actual or perceived impartiality, and VII(C) prohibits a mediator from listing the names of clients or persons served in mediation without their permission.

# J. <u>Standard VIII: Fees and Other Charges</u>

The Model Standards (September 2005) amends the title of this Standard from the 1994 Version by adding the words, "and other Charges."

Several developments have prompted amendments to the 1994 Version. The language of VIII (A) and VIII (A) (1) provide guidance to a mediator regarding basic principles on which to construct a fee; the language of VIII (B), while not prohibiting the amount a person might charge for his or her mediation services, does mandate that the method or structure for fee payments cannot operate at cross purposes with such fundamental values of the mediation process as party self-determination or mediator impartiality.

Some scholars and practitioners have urged members of the "mediation field" to carefully examine the relationship between mediator fees and mediated outcomes. Recognizing that there remains significant controversy about whether or how success or contingent fees might operate consistently with other Standards, the Joint Committee, in Standard VIII (B)(1), retained the language of the 1994 Version regarding these matters.

A significant, controversial practice that has developed in private sector mediation practice during the past decade is the situation in which the mediator's fee is paid in unequal amounts by the parties. The presumptive norm had been that parties pay the mediator's fees in equal amounts, thereby insuring that the mediator's impartiality, both in perception and reality, was secured. The reality of contemporary practice in some sectors is that one party pays the entire fee and that all parties are comfortable with that arrangement. This practice occurs routinely in such areas as the mediation of

employment discrimination lawsuits, where the defendant employer pays the mediator's fee, personal injury litigation, and the like. Some argue that parties would not have access to the benefits of mediation if such fee payment arrangements were not available.

The Joint Committee believed that, at the practical level, this practice of parties' paying unequal amounts of the mediator's fee creates the danger of undermining process integrity in two important ways: first, if the parties were not aware of this arrangement, one party, upon learning of it at a later date, might believe the outcomes had been skewed in favor of the party who had paid the higher percentage of the mediator's fee; second, if the payer of the higher fee percentage is that mediator's primary or exclusive client, the practice might create the impression that the mediator's financial interest in servicing that client outweighed his or her commitment to conducting a quality process in an impartial manner. For both situations, the Joint Committee believed that the appropriate stance of the Standard should, in the first instance, support disclosure of the arrangement to all participants, since unequal payments of fees almost always creates a perception of partiality; further, the Standard should require the mediator to be attentive to how that practice, even when acceptable to all parties, impacts the integrity of the process. Standard VIII (B) addresses these concerns.

The Model Standards (September 2005) eliminates the proposed language of the Model Standards (January 2004) regarding excepting administrative fees from the concept of referral fees; public comment raised important questions about the meaning of "administrative expense" and the Joint Committee refocused its comments to address the mediator, not provider agencies or other program sponsors.

# K. Standard IX: Advancement of Mediation Practice

The Model Standards (September 2005) changes the title of this Standard from the 1994 Version, replacing "Obligations to the Process" with "Advancement of Mediation Practice." The Joint Committee believes the proposed title more accurately reflects the Standard's intended focus.

Standard IX (A) (1-5) delineates some of the ways in which an individual can participate in advancing mediation practice. Given the targeted definitions provided to the terms "shall" and "should" in the Model Standards (September 2005), and consistent with public suggestions, the Joint Committee uses the term, "should," in the statement of Standard IX. The Joint Committee does not believe the delineated list of activities for advancing the practice of mediation is exhaustive nor that a mediator need engage in all of these initiatives all the time; the second sentence of Standard IX (A) reflects that judgment. Finally, the Joint Committee embraced as persuasive the thoughtful public comments that recommended that the language of Standard IX (B) substitute the word "respect" for "tolerate."

Joseph B. Stulberg, JD, Ph.D.

Reporter Professor of Law Moritz College of Law, The Ohio State University Columbus, Ohio

Membership of Joint Committee for the Model Standards of Conduct for Mediators (July 29, 2005)

Sharon B. Press, Attorney/Mediator Director, Florida Dispute Resolution Center Adjunct Professor, Florida State University College of Law Tallahassee, Florida

R. Wayne Thorpe Mediator/Arbitrator JAMS Atlanta Office Director Atlanta, Georgia

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# Model Rules of Professional Conduct (2002) EXCERPTS

AMERICAN BAR ASSOCIATION

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Rule 1.12: Former Judge, Arbitrator, Mediator or Other Third-Party Neutral

## Client-Lawyer Relationship Rule 1.12 Former Judge, Arbitrator, Mediator Or Other Third-Party Neutral

- (a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer or law clerk to such a person or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed consent, confirmed in writing.
- (b) A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other third-party neutral. A lawyer serving as a law clerk to a judge or other adjudicative officer may negotiate for employment with a party or lawyer involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge or other adjudicative officer.
- (c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:
- disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom and
- (2) written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this rule.
- (d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

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Comment on Rule 1.12

## Client-Lawyer Relationship Rule 1.12 Former Judge, Arbitrator, Mediator Or Other Third-Party Neutral - Comment

- [1] This Rule generally parallels Rule 1.11. The term "personally and substantially" signifies that a judge who was a member of a multimember court, and thereafter left judicial office to practice law, is not prohibited from representing a client in a matter pending in the court, but in which the former judge did not participate. So also the fact that a former judge exercised administrative responsibility in a court does not prevent the former judge from acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits. Compare the Comment to Rule 1.11. The term "adjudicative officer" includes such officials as judges pro tempore, referees, special masters, hearing officers and other parajudicial officers, and also lawyers who serve as parttime judges. Compliance Canons A(2), B(2) and C of the Model Code of Judicial Conduct provide that a part-time judge, judge pro tempore or retired judge recalled to active service, may not "act as a lawyer in any proceeding in which he served as a judge or in any other proceeding related thereto." Although phrased differently from this Rule, those Rules correspond in meaning.
- [2] Like former judges, lawyers who have served as arbitrators, mediators or other third-party neutrals may be asked to represent a client in a matter in which the lawyer participated personally and substantially. This Rule forbids such representation unless all of the parties to the proceedings give their informed consent, confirmed in writing. See Rule 1.0(e) and (b). Other law or codes of ethics governing third-party neutrals may impose more stringent standards of personal or imputed disqualification. See Rule 2.4.
- [3] Although lawyers who serve as third-party neutrals do not have information concerning the parties that is protected under Rule 1.6, they typically owe the parties an obligation of confidentiality under law or codes of ethics governing third-party neutrals. Thus, paragraph (c) provides that conflicts of the personally disqualified lawyer will be imputed to other lawyers in a law firm unless the conditions of this paragraph are met.
- [4] Requirements for screening procedures are stated in Rule 1.0(k). Paragraph (c)(1) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior

independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[5] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

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Rule 2.1: Advisor

## Counselor Rule 2.1 Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

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### **Offering Advice**

[5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

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## Rule 2.4: Lawyer Serving as Third-Party Neutral

## Counselor

## Rule 2.4 Lawyer Serving As Third-Party Neutral

- (a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.
- (b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a thirdparty neutral and a lawyer's role as one who represents a client.

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### Comment on Rule 2.4

# Counselor Rule 2.4 Lawyer Serving As Third-Party Neutral Comment

- [1] Alternative dispute resolution has become a substantial part of the civil justice system. Aside from representing clients in dispute-resolution processes, lawyers often serve as third-party neutrals. A third-party neutral is a person, such as a mediator, arbitrator, conciliator or evaluator, who assists the parties, represented or unrepresented, in the resolution of a dispute or in the arrangement of a transaction. Whether a third-party neutral serves primarily as a facilitator, evaluator or decisionmaker depends on the particular process that is either selected by the parties or mandated by a court.
- [2] The role of a third-party neutral is not unique to lawyers, although, in some court-connected contexts, only lawyers are allowed to serve in this role or to handle certain types of cases. In performing this role, the lawyer may be subject to court rules or other law that apply either to third-party neutrals generally or to lawyers serving as third-party neutrals. Lawyer-neutrals may also be subject to various codes of ethics, such as the Code of Ethics for Arbitrators in Commercial Disputes prepared by a joint committee of the American Bar Association and the American Arbitration Association or the Model Standards of Conduct for Mediators jointly prepared by the American Bar Association, the American Arbitration Association and the Society of Professionals in Dispute Resolution.
- [3] Unlike nonlawyers who serve as third-party neutrals, lawyers serving in this role may experience unique problems as a result of differences between the role of a third-party neutral and a lawyer's service as a client representative. The potential for confusion is significant when the parties are unrepresented in the process. paragraph (b) requires a lawyer-neutral to inform unrepresented parties that the lawyer is not representing them. For some parties, particularly parties who frequently use disputeresolution processes, this information will be sufficient. For others, particularly those who are using the process for the first time, more information will be required. Where appropriate, the lawyer should inform unrepresented parties of the important differences between the lawyer's role as third-party neutral and a lawyer's role as a client representative, including the inapplicability of the attorney-client evidentiary privilege. The extent of disclosure required under this paragraph will depend on the particular parties

involved and the subject matter of the proceeding, as well as the particular features of the dispute-resolution process selected.

- [4] A lawyer who serves as a third-party neutral subsequently may be asked to serve as a lawyer representing a client in the same matter. The conflicts of interest that arise for both the individual lawyer and the lawyer's law firm are addressed in Rule 1.12.
- [5] Lawyers who represent clients in alternative dispute-resolution processes are governed by the Rules of Professional Conduct. When the dispute-resolution process takes place before a tribunal, as in binding arbitration (see Rule 1.0(m)), the lawyer's duty of candor is governed by Rule 3.3. Otherwise, the lawyer's duty of candor toward both the third-party neutral and other parties is governed by Rule 4.1.

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### Rule 3.3: Candor Toward the Tribunal

### Advocate

#### Rule 3.3 Candor Toward The Tribunal

- (a) A lawyer shall not knowingly:
- (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer
- (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel or
- (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.
- (b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.
- (c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.
- (d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

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### Rule 4.1: Truthfulness in Statements to Others

## Transactions With Persons Other Than Clients Rule 4.1 Truthfulness In Statements To Others

In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person or
- (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

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## Rule 4.3: Dealing with Unrepresented Person

## Transactions With Persons Other Than Clients Rule 4.3 Dealing With Unrepresented Person

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

## ABA Model Code of Judicial Conduct: Canon 2.2

1/25/2015

Rule 2.2: Impartiality and Fairness

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## **Rule 2.2: Impartiality and Fairness**

A judge shall uphold and apply the law,\* and shall perform all duties of judicial office fairly and impartially.\*

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## Comment on Rule 2.2

- [1] To ensure impartiality and fairness to all parties, a judge must be objective and open-minded.
- [2] Although each judge comes to the bench with a unique background and personal philosophy, a judge must interpret and apply the law without regard to whether the judge approves or disapproves of the law in question.
- [3] When applying and interpreting the law, a judge sometimes may make good-faith errors of fact or law. Errors of this kind do not violate this Rule.
- [4] It is not a violation of this Rule for a judge to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard.

## 2015 ABA SECTION ON DISPUTE RESOLUTION MEDIATION CONVENING AND INTAKE BEST PRACTICES.

## ITEM 12: SAMPLE MEDIATION DISCLOSURE FORM

Prepared by Nancy Greenwald

## DISCLOSURES OF MEDIATOR [NAME] CASE # [XXX]

Consistent with the MODEL STANDARDS OF CONDUCT FOR MEDIATORS (AAA and ABA), the Disclosure Requirements for Mediators serving on AAA cases, and the AAA Rules applicable to this case, I make the following disclosures. By making any general or specific disclosure below I do not ascribe, or intend to ascribe, any level of significance to the fact disclosed, or to suggest that the disclosure might conceivably affect my neutrality or impartiality. Rather, the following disclosures are made to apprise the parties and their representatives of facts which in my judgment it is appropriate to disclose. Any concerns relating to these disclosures, or any subsequent disclosures I may make, should be handled as provided below in Section V.

The disclosures made in this document are based on my review of the papers or other information provided to me by the AAA as of this date, and such review of my and my employer's records and files as to me seemed necessary and appropriate.

#### I. Conclusion

I have no disclosures specific to this case. I do not regard any of the following disclosures as constituting either a conflict of interest or raising an appearance of fairness issue requiring me to decline my appointment in this case. I am confident that I can carry out my duties as a neutral and impartial mediator.

- II. General Disclosures and Limitations
- A. Mediation Rate: [XXX] per Hour. Study time, pre-mediation conference(s) and post-mediation follow-up are billed at hourly rate. Travel and accommodations, if required, at actual cost. No charge for travel time except for case related work. Cancellation fee: 100% of payment is due if cancellation is within 2 working days of commencement of mediation; 50% of payment is due if cancellation is within 5 working days of commencement of mediation. Cancellation fees apply only to schedule in-person sessions and not to telephone sessions.
- B. Current and Prior Employment: [This section should contain a complete CV.]
- C. Nature of Disclosures

[COMMENT: LANGUAGE FOR PAST LAW FIRM WORK] If I am aware of any direct or indirect professional or personal connection of any kind or any potential conflict of interest or appearance of fairness issue related to any former client or any law firm listed above, I will disclose it below. I do not, however, have access to client records from firms with which I was previously associated, and thus will not be disclosing any matters relating to my work at those firms unless they occur to me; if they do, they will be disclosed below; if recollected later, I will make a supplemental disclosure.

[COMMENT: LANGUAGE FOR PAST CORPORATE EMPLOYMENT] If I am aware of any or indirect professional or personal connection of any kind or potential conflict of interest or appearance

of fairness issue related to any current or former client, employee, supplier, contractor, subcontractor, attorney or other person or entity arising from my work with [XXXX – Company Name], I will disclose it below. If I become aware of any such relationship at any time during the course of the proceedings, I will make a supplemental disclosure.

[COMMENT: LANGUAGE FOR CURRENT ACTIVITIES] If I am aware of any or indirect professional or personal connection of any kind or potential conflict of interest or appearance of fairness issue related to any current or former client, employee, supplier, contractor, subcontractor, attorney or other person or entity arising from my work with [XXX], or any other entity for which I provide services, I will disclose it below. If I become aware of any such relationship at any time during the course of the proceedings, I will make a supplemental disclosure.

D. Professional Associations: Both as a result of the foregoing and my active involvement over the years in activities of professional associations and organizations, I am professionally and personally acquainted with hundreds of lawyers both in the [XXX] metropolitan area and nationally. Organizations to which I belong include the following: [COMMENT: LIST INCLUDED BY WAY OF EXAMPLE] [the American Bar Association (ABA) Forum Committee on the Construction Industry (Division Memberships: Dispute Avoidance & Resolution, Contract Documents, and Project Delivery Systems), ABA Section on Dispute Resolution (Executive Committee, Leadership Council, and the following Committees: Arbitration, Mediation, Collaborative Law, Women in Dispute Resolution (co-chair), Membership (Chair)), ABA Litigation Section, ABA Section of Environment, Energy and Resources and the Law Practice Management Section (ABA Women Rainmakers)), the Virginia State Bar Association [Construction Law Section and Joint Alternative Dispute Resolution Committee], the Fairfax County Bar Association [ADR Section], the District of Columbia Bar Association, and the Women's Bar Association of DC.]

Although I will separately disclose specific personal and/or professional associations with counsel in this matter (and/or their law firms), you should assume that over the years I have may have had – as advocate or as neutral mediator or arbitrator – cases in which other lawyers in their respective law firms have been involved.

- E. Social Media: I have a Linked-In account. I approve most requests to link, and neither actively solicit (beyond what the software automatically does), nor remove endorsements, and do not maintain a database of all these professional contacts and connections. Accordingly, the existence of a link or endorsement on my account does not indicate type or depth of relationship other than an online professional connection, similar to connections in professional organizations. I do not have a Facebook account. I have created a Twitter account, but am not an active user.
- F. Prior ADR Matters: I am asked to serve as an arbitrator or mediator, both in connection with matters assigned by or through a service provider (e.g., AAA) and privately. While I will disclose in any subsequent mediation or arbitration involving any party to this case, its counsel or its counsel's law firm that I have been appointed, am serving or have served in a prior case involving that party, counsel or law firm, I will not disclose to the parties in this case any subsequent appointment or service.

#### III. Disclosures Related to Family

To the best of my knowledge, there is no connection between any member of my immediate family and any party, counsel, witness and/or other person or entity involved in this case that would create a potential conflict of interest or appearance of fairness issue. The following information is provided solely for the purpose of allowing the parties to this proceeding and their counsel to satisfy themselves of the same. My son is a consultant at the [XXX]; my eldest daughter is a screenwriter with [XXX], my youngest daughter is a student at [XXX].

## IV. Specific Disclosures

Parties & Counsel: To the best of my knowledge, I have no specific relationship or connection, current or former, direct or indirect with any party, counsel, witness and or other person or entity involved in this case that would create a potential conflict of interest or appearance of fairness issue.

V. Dealing with Concerns Over Disclosures/Limitations on Disclosures

Counsel, and/or any party not represented by counsel, are asked to share these disclosures with their clients and with anyone else expected to participate in the mediation. The parties and their counsel are asked to promptly bring to my attention and to the attention of the other Party, in writing, any relationships of which they are aware that I have not disclosed above and any concerns they may have regarding any of the disclosures made, either in this document or subsequently. Any such concerns will be promptly addressed, in writing, by the Mediator.

Dated: [XXXX]	
	Signature

## 2015 ABA SECTION ON DISPUTE RESOLUTION – MEDIATION CONVENING AND INTAKE BEST PRACTICES.

ITEM 13 – AGREEMENT TO MEDIATE CHECKLIST Prepared by Conna Weiner www.connaweineradr.com

#### AGREEEMENT TO MEDIATE - CHECKLIST

Selected, suggested topics to be addressed in a more fully developed agreement; note that confidentiality is provided for as a matter of contract and specifically includes intake/screening and other communications before the agreement to mediate was signed, as well as pursuant to recited applicable laws.

## 1. The Mediation Process

The purpose of the mediation process is to assist the parties cooperatively and informally to negotiate a resolution of their dispute that is acceptable to them and that they each believe is a resolution that is better than alternatives to a negotiated compromise and settlement, such as stalemate, arbitration or litigation.

## (a) Role of the Mediator.

Facilitate and improve communications and information exchange about the dispute; neutral and impartial

The mediator may discuss the dispute with the parties together and separately (ex parte) before, during or after the mediation session in an effort to help resolve the dispute.

The parties will follow the recommendations of the mediator as to the agenda and process most likely to resolve the dispute.

[The mediator may, in her discretion, and in addition to facilitating discussions, provide an evaluation of the likely resolution of the dispute if it is not settled.]

Mediator is not giving legal advice and is not acting as any party's attorney. The mediator does not owe any fiduciary duty to any party and is an impartial and neutral participant in the process.

Mediator not a therapist, social worker or psychiatrist.

## (b) Voluntary Process.

Process is voluntary.

Parties shall raise with the mediator any concerns they have about the process before or during the mediation

Any party may terminate or withdraw from the mediation for any reason at any time by written notification to the mediator and the other parties.

## (c) Preparation.

The mediator shall seek to speak to the participating parties separately before the mediation to understand the nature of the dispute, the parties' fundamental interests and concerns and the parties' views about any impediments to settlement.

Parties shall endeavor to come to the mediation prepared with reasonable knowledge of the basic facts, documents and law of their case that are within their control, such as: insurance, issues that need to be covered, drafts of documents they would like to be signed, required approvals, legal or approval requirements.

## (d) Participants; Authority to Settle.

Bring to the mediation those persons or representatives believed to be necessary or appropriate to resolve the dispute.

Obtain full authority or have full authority to settle the dispute among those in attendance.

## 2. <u>Legal Representation</u>

The parties understand that they may consult legal counsel at any time, and, if the parties have not already arranged for legal representation in connection with the mediation, they are strongly urged to do so. [Consider: If a party has any concerns about proceeding without additional legal advice, they should immediately advise the mediator so that the mediation can be suspended or terminated.]

## 3. Confidentiality

## (a) Scope of Confidentiality.

The parties and the mediator agree that the entire mediation process is confidential and privileged pursuant to \_\_\_\_\_\_ and, in addition, any

other applicable state law, and shall be treated as a compromise negotiation for the purposes of the Federal Rules of Evidence (such as F.R.E. 408) and any applicable state laws.

The parties and the mediator further agree as a matter of contract that the entire mediation process, including but not limited to intake, screening and any preliminary discussions before this agreement to mediate was signed, with either party or both parties and the mediator or the mediator representatives, is confidential and agree not to disclose any information [specify confidential information as appropriate]

## (b) Exceptions to Confidentiality

- (i) The parties may disclose information about the mediation to their respective attorneys, financial advisors and, in the case of a business or non-profit organization, those within the business or organization with a need to know, provided, however, that they shall inform all such individuals that the information is confidential and privileged, may not be disclosed to others and is governed by the terms of this agreement.
- (ii) The mediator may disclose to appropriate authorities information obtained in the course of the mediation concerning [include exceptions compliance with state law requirements, such as child/elder abuse, serious harm to an individual, criminal activity, etc.]
- (iii) The confidentiality and privilege provided for in this agreement shall not apply to information the parties agree in writing, after the conclusion of the mediation, may be disclosed.
- (iv) Unless the parties agree otherwise in writing, nothing in this agreement shall prevent any party from presenting an interim or final agreement or signed memorandum of understanding executed as part of the mediation process to a court for purposes of enforcement of that agreement or understanding.
- (c) <u>Testimony</u>. The parties agree that: (i) they shall not seek to obtain the testimony of the other party or the mediator regarding the mediation, and that the mediator will be disqualified as a witness or expert in any pending or subsequent litigation or arbitration involving the parties and relating in any way to the dispute or (ii) the disclosure of the mediator's file or documents related to the matter, and that if either party seeks such testimony or disclosure by the mediator in contravention of this provision, that person shall reimburse the mediator for all costs in connection therewith, including reasonable attorney's fees, and shall compensate the mediator at the mediator's then current hourly rate.

- (d) <u>Separate Meetings</u>. The mediator may communicate separately with either or both parties or their counsel as part of the mediation process and, in connection with any such separate communication, a Party or/his/her counsel may request that the mediator keep confidential all or party of what was communicated. The mediator agrees to honor all such requests except to the extent that the substance of the communication falls within one of the exceptions to confidentiality set forth in this agreement.
- (e) <u>Stenographic Record</u>. The parties and the mediator agree that, except insofar as all parties may otherwise agree in connection with the recording of a settlement agreement, there shall be no stenographic record or other recording of any meeting. The parties and the mediator may, however, take notes during the mediation sessions.
- (f) <u>Duration of Confidentiality Obligations</u>. The confidentiality obligations set forth in this agreement shall remain in effect even after the completion of the mediation process, regardless of whether the matter is resolved by settlement or not.

## 4. <u>Disclosure of Prior Relationships</u>

- (a) The mediator's obligation. The mediator shall make reasonable effort to learn and has disclosed to the parties (i) all social, business or professional relationships of which the mediator is aware that the mediator has had with the parties or their counsel; (ii) any financial interest the mediator has in any party or in the outcome of the case; and (c) any other circumstances that may create doubt regarding the mediator's impartiality in the mediation.
- (b) <u>The parties' obligation</u>. The parties hereby confirm that they are not aware of any conflict of interest with regard to the mediator's serving in this matter, or any prior relationship with the mediator that has not been disclosed. Extensive information about the mediator's background is available [in her disclosure statement provided to the parties] [on her website] [on the mediation organization's website] [specify other sources] at and should be reviewed by the parties.
- (c) <u>Mediator Liability</u> The parties agree that the mediator shall not be liable for any act or omission in connection with this mediation other than for acts of gross negligence or bad faith.
- 5. <u>Future Relationships</u> The mediator shall not undertake any attorney legal work for or against either party regarding the subject matter of the mediation.

6.	<u>Com</u>	<u>pensation</u> .

(a) <u>Services Covered by this Agreement; Hourly Rates and Expenses.</u> [Adjus as necessary but disclose every item that will be billed.] The parties understand that they will be billed for all time spent in preparation for and at mediations sessions, telephone conferences, sending and responding to emails, preparing documents, whether before, during or after the mediation sessions(s), and review of memos and other material submitted to the mediator by the parties The parties will be billed at the mediator's cost for such necessary expenses as copies, faxes, long distance telephone calls, mailings and other items. The mediator's hourly rate for all services performed by the mediator shall be
(b) <u>Allocation of Costs</u> . The parties agree to pay these fees and expenses in the following manner:% by and% by
(c) <u>Deposit; payments</u> . [Specify any deposits/retainers required, where invoices are to be sent, address for payments.]
[(d) <u>Cancellation</u> . In the event that a party cancels a scheduled mediation for any reason on less than one weeks' notice to the mediator, that party shall pay forfeit their deposit.]
7. Miscellaneous.
(a) Entire Agreement. This agreement constitutes the entire agreement of the parties and mediator as to the mediation described herein and supersedes all previous oral and written agreements between or among themselves regarding the mediation. No modification of this agreement may be made except in a writing signed by the parties and the mediator.
(b) <u>Governing Law</u> . The terms of this agreement shall be governed by the law of
(d) This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, and all of which together shall be deemed to be one and the same instrument.  [Include party reps as well as their lawyers]
[Party A] [Party B]
[Mediator]

## 2015 ABA SECTION ON DISPUTE RESOLUTION MEDIATION CONVENING AND INTAKE BEST PRACTICES

## ITEM 14: SAMPLE ENGAGEMENT LETTER AND AGREEMENT TO MEDIATE

[DATE]

#### VIA ELECTRONIC MAIL

[CLAIMANT NAME ATTORNEY NAME AND ADDRESS]

[RESPONDENT NAME ATTORNEY NAME AND ADDRESS]

RE: [CASE NAME AND NUMBER IF ANY]

#### ENGAGEMENT LETTER AND AGREEMENT TO MEDIATE

To Counsel and the Parties:

The undersigned Parties hereby agree to participate in mediation of their dispute in accordance with the following terms:

- 1. <u>DEFINITION OF MEDIATION</u>: Mediation is a voluntary process in which a neutral person (the Mediator) facilitates communication between the parties and, without deciding the issues or imposing a solution on the Parties, assists them to reach a mutually agreeable resolution to their dispute. The goal of Mediation is a formal written Mediated Settlement Agreement, acceptable for court filing.
- 2. <u>VOLUNTARINESS AND SELF-DETERMINATION</u>: Participation in mediation is voluntary. The Mediator will conduct the mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary decision in which each party makes free and informed choices as to process and outcome. The mediation process can be terminated at any time by either party or by the Mediator.

[COMMENT: This language is adapted from the The Model Standards of Conduct for Mediators, 2005, Standard 1.A.]

3. **ROLE OF THE MEDIATOR:** The Mediator assists the Parties in identifying issues, reducing obstacles to communication, maximizing the exploration of alternatives, and reaching a voluntary and mutually agreeable solution to the Parties' dispute. The Parties understand and agree that the Mediator does not represent any Party in this mediation. The Mediator does not give legal or financial advice or legal or financial counsel. The Mediator has no duty to provide advice or information or to assure that any Party understands the consequences of his or her actions. The Mediator's function is to promote and facilitate voluntary resolution of the matter.

- 4. **APPOINTMENT OF MEDIATOR:** The Parties agree that [YOUR NAME HERE] shall be the mediator.
- 5. <u>APPLICABLE RULES</u>: [COMMENT: Where specific rules are specified in the underlying contract or otherwise, I identify them in the Engagement letter.]
- 6. **PRE-MEDIATION SCHEDULING CONFERENCE:** The Mediator will schedule a pre-mediation scheduling conference within 10 business days after receiving signed copies of this Agreement signed by all Parties. At this conference, the Mediator and the Parties will review the Mediation Process Agreement (copy attached).
- 7. **COOPERATION AND GOOD FAITH:** The Parties agree to cooperate with each other and with the Mediator and to actively participate in the search for fair and workable options.
- 8. <u>Confidentiality</u>: The parties recognize that the mediation sessions are compromise negotiations and are inadmissible in any litigation of their dispute to the extent allowed by law. All memoranda, work products and other materials contained in the case files of a Mediator are confidential. Any communication made in or in connection with the mediation, which relates to the controversy being mediated, including screening, intake, and scheduling a mediation, whether made to the Mediator, to a party, or to any other person, is confidential. However, a written mediated agreement signed by the parties shall not be confidential, unless the parties otherwise agree in writing.
- 9. <u>Consulting with Advisers</u>: All parties are encouraged to consult with an attorney, accountant or other advisor before, during and after the mediation session and before finalizing an agreement regarding legal rights and obligations.
- 10. <u>CAUCUSES</u>: The mediator may hold private sessions (caucuses) with either party at any time. The information gained in private sessions may not be shared in joint session, unless the participant consents to disclosure.

## 11. MEDIATOR'S IMMUNITY FROM FUTURE SUBPOENA OR DISCOVERY REQUESTS, AND DISQUALIFICATION AS WITNESS

The Parties may not subpoena or otherwise require or compel the Mediator to testify or to produce any of her records, notes or work product concerning any aspect of the Mediation in any further proceedings of any type and in any jurisdiction.

The Mediator will be disqualified as a witness, consultant or expert in any pending or future action relating to the Dispute or other subject matter of the Mediation, including actions between people not parties to the Mediation.

To the extent the Mediator receives a third-party request, in the form of a subpoena or other legal demand, for any such information or documents related to the Mediation, then, as soon as practical after its receipt and prior to complying to the extent required by law, the Mediator will so inform the Parties of the request and its terms in order to enable the Parties to respond accordingly to the issuance of the request.

## 12. COMMUNICATION

Any and all correspondence relating to this Mediation and/or documents to be filed with or submitted to the Mediator outside the hearing may be sent directly to the Mediator to the email address specified.

Communications to the Mediator shall be emailed to the Mediator at: [E-MAIL Address].

Communications to the Parties shall be as follows:

Communications to Claimants: [email address].

Communications to Respondent: [email address]

### 13. MEDIATOR'S ACKNOWLEDGEMENTS AND DISCLOSURES

The Mediator acknowledges that she is independent of the Parties and the Dispute, and is impartial. Each Party acknowledges receipt of a copy of the Mediator's resume and any disclosures previously made and/or attached hereto. Each Party and its Counsel have made reasonable effort to learn and have disclosed to the other Party and Mediator, in writing, any fact or circumstance that constitutes a conflict of interest or raises an appearance of bias or evident partiality that might justify the Mediator's removal or recusal.

The Parties and the Mediator are satisfied that any relationships that have been so disclosed will not affect the Mediator's independence or impartiality. Notwithstanding such relationships that the Mediator and the Parties did not discover despite good faith efforts to do so, the Parties wish the Mediator serve in this Mediation, waiving any claim based on those relationships, and the Mediator agrees to so serve.

The disclosure obligations set forth above are continuing on both the Parties and the Mediator until this Mediation is concluded. The ability of the Mediator to continue serving as Mediator shall be explored by the Mediator and the Parties with each such disclosure, to the extent any such disclosures subsequently occur.

#### 14. MEDIATOR'S COMPENSATION

The Mediator's rate is \$XXX per hour. Study time, pre-mediation conference(s) and post-mediation follow-up are billed at hourly rate. Travel and accommodations, if required, at actual cost. No charge for travel time except for case related work. Cancellation fee: 100% of payment is due if cancellation is within 2 working days of commencement of mediation; 50% of payment is due if cancellation is within 5 working days of commencement of mediation. Cancellation fees apply only to schedule in-person sessions and not to telephone sessionsThere would be no administrative or other fees charged to the Parties.

The Parties shall split equally the fees and expenses of the Mediator upfront, unless they agree otherwise and inform the Mediator of this. Within 5 days after the Premediation Scheduling Conference, the Mediator will send the Parties an estimate of the mediation costs. On or before [DATE] the Parties shall each pay [50% of ESTIMATE], by check made payable to "XXXXXX" ("the firm"), with receipt required on or before XXXXXXX.

## 15. BILLING, PAYMENTS

Payments shall be remitted by US postal mail to:

### 16. No Action Against Mediator

The Parties specifically stipulate and agree that no action may be brought against the Mediator arising from the discharge of her duties in connection with the Mediation, and expressly agree that the Mediator shall not be liable to pay any Party or its counsel for any act or omission relating in any way to or in connection with the Mediation. Each Party expressly covenants not to commence an action or administrative proceeding, in court or in Mediation, against the Mediator concerning her services as Mediator. No Party or Counsel will ever subpoena the Mediator to testify in any action or proceeding, in Mediation or otherwise, as to anything arising out of, relating to, or connected in any way with the Mediation. The Parties also agree that the Mediator is not in any way a necessary party in any judicial proceeding related in any way to the Mediation. Each Party agrees to hold the Mediator harmless against any claims, demands, or lawsuits. The Parties further agree that in the event a Party does subpoena the Mediator to testify, that Party shall compensate the Mediator at her then-applicable hourly rate for all the Mediator's time and expenses related to the Mediator's response to the subpoena.

## 17. COUNTERPART EXECUTION

\*\*\*\*\*\*\*\*\*\*\*

This document may be executed in any number of counterparts. Each of the counterparts shall be deemed an original. Once each counterpart is duly executed by an appropriate Party or Counsel, all such counterparts will collectively constitute the executed agreement.

### 18. **SEVERABILITY**

Printed name of attorney

If any portion of this document is to be unenforceable, that portion is so severed from this agreement with the remaining provisions continuing in full force and effect.

Please sign on the appropriate line below, scan and e-mail a copy of the signed letter to the Mediator and opposing Counsel no later than 5:00 pm, Thursday, [XXXXX].				
	Very truly yours,			
	Mediator			
For and on behalf of Claimants	For and on behalf of Respondent			
[NAME OF CLAIMANTS]	[NAME OF RESPONDENT]			

Printed name of attorney

## 2015 ABA SECTION ON DISPUTE RESOLUTION ANNUAL MEETING MEDIATION CONVENING AND INTAKE BEST PRACTICES

## ITEM 15: SAMPLE PRELIMINARY HEARING TELECONFERENCE AGENDA Prepared by Nancy Greenwald

[DATE]

#### VIA ELECTRONIC MAIL

[CLAIMANT NAME ATTORNEY NAME AND ADDRESS]

[RESPONDENT NAME ATTORNEY NAME AND ADDRESS]

RE: [CASE NAME AND NUMBER IF ANY]

#### PRELIMINARY MEDIATION TELECONFERENCE AGENDA

To Counsel and the Parties:

Please review the following Agenda for our Preliminary Mediation Teleconference, scheduled for [TIME], EST, [DATE]. We will address the matters identified in this agenda and any other issues counsel deem appropriate. The following is intended only as a guideline for discussion. The purpose of this call from my point of view is (1) to work through the scheduling details and related matters, (2) to learn more about the substance of the dispute, (3) to learn how long the parties have been engaged in discussions concerning this dispute, (4) to learn the procedural status of the dispute, and (5) to address any other matters counsel deem relevant to resolving the dispute through mediation. Procedural, scheduling, and other process agreements reached during our teleconference will become the basis for a Preliminary Mediation Hearing Report and Agreement.

### 1. MEDIATION SCHEDULE

Counse	I for the Parties agreed to the following sche	edule:
have co	authorized representatives should have no o	Counsel for the Parties and sentatives are available on that date. Counsel other appointments scheduled for that day and n order to ensure the success of the process.
TIME:	The mediation session will commence at _	am.
LOCAT	ION: The location of the mediation session v	vill be the office of

#### 2. AUTHORIZED REPRESENTATIVES

Counsel for the Parties have represented that they will have present individuals who are authorized representatives, with full authority to negotiate and execute a mediated settlement agreement on behalf of the Party they represent, and further that these authorized representatives will be present for the entirety of the mediation session:

For the Claimant:	;
For the Respondents:	

#### 3. MEDIATION STATEMENTS

In order to ensure the most productive mediation session, on or before the close of business Friday, \_\_\_\_\_\_, counsel for each Party will provide the Mediator with a Mediation Statement. The Mediation Statements shall not exceed ten (10) pages in length. The Mediation Statement shall be shared with the opposing Party, except for any portions designated as confidential, which shall be provided only to the Mediator.

#### 4. DOCUMENTS

Claimant will also provide the Mediator with a copy of each of the following: (1) the underlying Contract, (2) [LIST ANY DOCUMENTS YOU FEEL YOU NEED TO REVIEW PRIOR TO THE MEDIATION]. Each Party will provide the Mediator with any additional documents they believe are necessary and/or desirable for her review prior to the mediation hearing. It should be understood by the Parties and their counsel that the purpose of requesting these documents is simply to provide the Mediator with a more complete understanding of the underlying facts.

Prior to the mediation session, the Parties shall engage in a good faith exchange of documents supporting their analysis of the matter to be resolved.

The Parties are encouraged to share with each other and the Mediator any documents they believe will be helpful in resolving the dispute.

The Parties shall bring to the mediation session any documents they believe will assist in the resolution of the matter.

CONFIDENTIALITY – TO PROTECT CONFIDENTIALITY, UNLESS OTHERWISE SPECIFICALLY MARKED TO THE CONTRARY, ALL DOCUMENTS PROVIDED TO THE MEDIATOR WILL REMAIN CONFIDENTIAL AND WILL NOT BE SHARED WITH THE OTHER PARTY.

#### 5. OPENING STATEMENTS

The Mediator will make an opening statement at the beginning of the mediation. Opening statements by counsel for the parties are optional. If agreed to, each Party will be given no more than ten (10) minutes to give an opening statement, being mindful that the goal of such statements is to encourage resolution of the matter.

#### 6. DISCLOSURE

A fundamental requirement of mediation is that the Mediator is a neutral party. Pursuant to AAA rule M-6, I have provided a written disclosure to both Parties in this matter for their review and consideration. Disclosure is an important and continuing obligation, and I will inform counsel for the Parties if at any time I become aware of any actual conflict or any matter that might cause an appearance of partiality that would prevent me from serving effectively as a Mediator in this matter.

#### 7. FUTURE COMMUNICATIONS

Counsel for the Parties may communicate with me directly concerning this mediation, including to transmit the documents identified above, by email to [EMAIL] or by phone to [PHONE]. This includes confidential matters, if any, either attorney would like to communicate to me prior to the scheduled mediation session.

I look forward to speaking with you.





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WSBARNEWS

## Supreme Court Confirms that Judges Can Assist Pro Se Litigants, Rules on Other Petitions

JOERORWARD. Legal Writer

Comments (0)

SHARETHS:

May 28, 2014 – State court judges and court commissioners are authorized to use techniques to help level the playing field for self-represented and other litigants under the judicial code of conduct, under a petition tentatively approved by the state supreme court.

At its open administrative conference May 27, the supreme court voted 6-1 to approve in principle petition 13-14, submitted by the Wisconsin Access to Justice Commission.

The petition, likely to take effect July 1, 2014, would amend and create Wisconsin Code of Judicial Conduct rules to make clear that judges can take "reasonable efforts" to facilitate the ability of all litigants, including self-represented litigants, to be fairly heard.

That is, judges can use certain techniques that facilitate the proceedings without the risk of being charged with ethics violations that ensure judges remain impartial.

The petition recognizes the increased number of pro se litigants and the court system's challenge in helping those litigants receive fair hearings while remaining neutral. The petition gives courts the discretion to use certain techniques that help litigants.

The techniques that Wisconsin judges and court commissioners may use to facilitate efficient and fair proceedings include, but are not limited to:

Court Approves Petition Allowing State Band Viscosinto Publish Official Natices in Flectronic **Media Formats** Live 1

- construing pleadings to facilitate consideration of the issues raised
- providing information or explanations about the proceedings
- explaining legal concepts in everyday language
- asking neutral questions to elicit or clarify information
- modifying the traditional order of taking evidence
- permitting narrative testimony
- allowing litigants to adopt their pleadings as their sworn testimony referring litigants to any resources available to

Under Wisconsin Supreme Court Rules, the State Bar of Wisconsin must publish official notices – such orders of the supreme court – in the Wisconsin Lawyer magazine, the official publication of the State Bar.

The approved petition (13-08), submitted by the State Bar of Wisconsin in June 2013, allows the State Bar to designate electronic media as official publication for the purpose of providing notice to its members.

The State Bar's Board of Governors must approve a plan for how the State Bar will publish notices to the membership through electronic media, and the plan will be published in various outlets to notify members.

Electronic publication of official notices gives the State Bar more flexibility to inform its members while saving printing costs.

- assist in the preparation of the case or enforcement and compliance with any order and
- informing litigants what will be happening next in the case and what is expected of them.

In February, numerous judges and attorneys appeared to testify in support of the petition, submitted in 2013. Many said the petition codifies what judges already do under their discretionary authority, but provides assurances under the judicial code.

Judges – including municipal court judges, court commissioners, circuit court judges, appeals court judges, and justices of the Wisconsin Supreme Court – could invoke their discretionary authority to use techniques that assist or guide pro se litigants, but judges don't have to employ those techniques. The rule is permissive, not mandatory.

In addition, the rule is not limited to self-represented litigants. Judges could potentially facilitate the proceedings to assist litigants with inexperienced or struggling lawyers.

The court has tentatively agreed to an effective date of July 1, 2014, and the final petition will likely include a provision, suggested by Justice Patience Roggensack, that makes clear that judges are not required to employ the techniques permitted by the rule.

Roggensack said she was undecided about the petition, but made clear in the open administrative conference that she thought the rule was a bad idea.

"This puts the judge's foot in the advocacy box," Roggensack told the other justices. "I think it's a huge mistake. For the court to do this is a huge mistake."

"I fully support a person's right to appear in court pro se," she said. "What I do not support is having the judge assist those people in ways that deviate from the judge as an independent, neutral in the courtroom. I think this rule is way too overbroad."

Others noted that the petition received support from judges and lawyers across the state, including the Wisconsin Trial Judges Association, the Committee of Chief Judges, the Family Court Commissioner's Association, and the Wisconsin Court of Appeals.

Comments (0)

SHARETHS:



## Conna Weiner Independent Mediator, Arbitrator and Consultant www.connaweineradr.com

(617) 780-5385 cw@connaweineradr.com

Conna has diversified experience in U.S. and global business counseling, transactions, litigation/alternative dispute resolution/management and compliance.

She began her legal career as a civil litigator at Paul, Weiss, Rifkind, Wharton & Garrison, where her first assignment was to an oil transshipment industry dispute ultimately resolved through a self-administered, three-year international arbitration presided over by a retired federal circuit court judge.

She then moved in-house to the life sciences and healthcare industries (primarily pharmaceuticals, biotech and device), where she spent over twenty years, including a number of stints in Switzerland in global positions and as a General Counsel, involved in general corporate, complex commercial, research, development, transactional (licensing, mergers and acquisitions, supply/manufacturing, etc.), antitrust, intellectual property, regulatory and compliance counseling, negotiation and litigation/dispute resolution issues.

Having developed a strong interest and belief in alternative dispute resolution during her years as a hands-on business lawyer and litigation manager, Conna is now an independent mediator and arbitrator, mediating and arbitrating a variety of commercial business and consumer disputes. Her panel appointments include the CPR Panel of Distinguished Neutrals as both a mediator and arbitrator (where she is a member of the healthcare and life sciences/biotech specialty panels as well as a general commercial panel), the American Arbitration Association Commercial Arbitration Panel and the American Health Lawyers' Association Panel of Neutrals. In 2013, she was appointed a Higginbotham Fellow with the American Arbitration Association. She is a board member of the Cambridge Dispute Settlement Center in Cambridge, MA.

Conna is a graduate of Oberlin College (B.A. in Government/Political Theory and Dance) and the University of Chicago Law School.



## NANCY WIEGERS GREENWALD ngreenwald@construction.org

Nancy Wiegers Greenwald has more than 30 years of experience in as an attorney and business executive in the construction industry and has extensive experience in litigation, alternative dispute resolution, and as the general counsel and CFO of a design-build construction company. She serves on the American Arbitration Association's Construction Industry Panel of Arbitrators and Mediators and has been appointed as a private arbitrator by the Virginia Courts. In addition to being a member of the Forum on Construction Law, Ms. Greenwald is a member of the Executive Committee and Leadership Council of the Dispute Resolution Section and co-chair of the Women in Dispute Resolution Committee. She is a certified as a mediation trainer by the Dispute Resolution Services office of the Virginia Supreme Court and has regularly served as a discovery motions conciliator in the Circuit Court of Fairfax County, Virginia. Ms. Greenwald provides ADR services through Construction Dispute Solutions, PLLC Construction-Dispute-Solutions.com.

As of January 19, 2015, Nancy Greenwald is the Executive Director of the <u>Construction Institute</u> of the University of Hartford, in Hartford, CT. The mission of the Construction Institute is unique: "To be a leading knowledge network for the exchange of information and innovative ideas by creating stronger collaborative relationships among architects, engineers, constructors, owners and other industry stakeholders." Lawyers, including neutrals, are an important part of the membership and are welcome to join. She looks forward to working with her colleagues in the ABA Section of Dispute Resolution to further the goals of the Institute.

Ms. Greenwald has numerous publications in dispute systems design, arbitration and complex construction contracts. She received her J.D. from Harvard Law School (1981, *cum laude*) and her Sc.B. from Brown University (1978, *magna cum laude*).