

**ABA MODEL RULES FOR MEDIATION
OF CLIENT-LAWYER DISPUTES**

*Adopted by the American Bar Association
House of Delegates on August 4, 1998*

**AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON CLIENT PROTECTION
1997-1998**

Victor F. Battaglia, *Chair*
Wilmington, DE

Mary Ellen Bateman
Tallahassee, Florida

Barbara S. Rea
Frankfort, Kentucky

James S. Hill
Bismarck, North Dakota

James E. Towery
San Jose, California

Peter H. Lousberg
Rock Island, Illinois

William I. Weston
Jacksonville, Florida

John F. McCarthy, Jr., *Liaison*
ABA Board of Governors
Santa Fe, New Mexico

**ADVISORY COMMISSION ON
LAWYERS' FUNDS FOR CLIENT PROTECTION
1997-1998**

Janet Green Marbley, *Chair*
Columbus, Ohio

Susan C. Busch
Richmond, Virginia

Helen Desmond McDonald
Providence, Rhode Island

Eileen W. Donahue
Chicago, Illinois

William D. Ricker, Jr.
Fort Lauderdale, Florida

Paul Kazaras
Philadelphia, Pennsylvania

David N. Shearon
Nashville, Tennessee

CENTER FOR PROFESSIONAL RESPONSIBILITY

Director
Jeanne P. Gray

Client Protection Counsel
John A. Holtaway

MODEL RULES FOR MEDIATION OF CLIENT-LAWYER DISPUTES

PREFACE

On February 4, 1992, the American Bar Association House of Delegates adopted the Report of the Commission on Evaluation of Disciplinary Enforcement (the "McKay Commission"). The Commission was created in February 1989 to conduct a nationwide evaluation of lawyer disciplinary enforcement and to provide a model for responsible regulation of the legal profession into the twenty-first century. Recommendation 3 of the McKay Commission Report called for jurisdictions to expand their systems of lawyer regulation by establishing mechanisms to resolve disputes between clients and lawyers and handle non-disciplinary complaints about lawyers. Mechanisms for fee arbitration, mediation, lawyer practice assistance and lawyer substance abuse counseling were recommended.

In 1996 the Joint Committee on Lawyer Regulation of the ABA Center for Professional Responsibility began drafting model rules for the mediation of complaints against lawyers which alleged lesser misconduct. The Committee reviewed mediation programs and rules from California, Colorado, Missouri, New York and Wisconsin. Additionally, the Committee studied the ABA *Model Rules for Fee Arbitration* that had been adopted in February 1995 by the American Bar Association House of Delegates. In 1997, the task of finalizing the mediation rules was passed to the ABA Standing Committee on Client Protection. In December 1997 the Committee circulated for comment a draft of the Model Rules to Association entities and judicial and legal organizations across the country. On August 4, 1998, at its Annual meeting in Toronto, the American Bar Association House of Delegates adopted the black-letter of the *Model Rules for Mediation of Client-Lawyer Disputes*.

The *Model Rules for Mediation of Client-Lawyer Disputes* are designed to assist jurisdictions interested in implementing a voluntary mediation program. The Model Rules will be subject to modification at the level of local implementation. The Comments do not add obligations to the Model Rules but provide guidance for conducting a mediation program in compliance with the Model Rules.

Mediation is a process by which those who have a dispute, misunderstanding or conflict come together and, with the assistance of a trained neutral mediator, resolve the issues and problems in a way that meets the needs and interests of both parties. Mediation can help to preserve the client-lawyer relationship. For both clients and lawyers, the mediation process is an alternative to litigation or other more formal and expensive dispute resolution mechanisms. The mediation process will benefit the public by directly addressing instances where a lawyer is alleged to have engaged in lesser misconduct but the misconduct does not warrant a formal disciplinary proceeding. The mediation process will also protect the public by removing matters involving lesser misconduct from the disciplinary system and thereby allowing disciplinary counsel to focus their efforts on more serious matters.

Rule 1. GENERAL PRINCIPLES AND JURISDICTION

A. Definitions.

- (1) A "Client" means a person or entity who directly or through an authorized representative consults or retains a lawyer in the lawyer's professional capacity.
- (2) "Commission" means the Client-Lawyer Mediation Commission.
- (3) "Lawyer" means any lawyer admitted to practice law in [name of jurisdiction], including any formerly admitted lawyer, any lawyer specially admitted by a court of this jurisdiction for a particular proceeding and any lawyer not admitted in this jurisdiction who practices law or renders or offers to render any legal services in this jurisdiction.

B. Establishment; Purpose. It is the policy of the [highest court of the jurisdiction] to encourage the informal resolution of disputes between lawyers who practice law in [name of jurisdiction] and their clients. To that end, the [highest court of the jurisdiction] hereby establishes through adoption of these rules, a program for mediation of client-lawyer disputes. The program

includes mediations referred by [the lawyer disciplinary agency] and voluntary mediation requests made by the client or by the lawyer, if both the client and the lawyer agree to mediate.

C. Jurisdiction.

- (1) Any lawyer is subject to these rules for mediation.
- (2) The Commission has jurisdiction over disputes that involve lesser misconduct or no misconduct on the part of the lawyer and appear to be resolvable by mediation.
- (3) The Commission has jurisdiction over disputes referred by [the lawyer disciplinary agency] and voluntary mediations in which a lawyer or client requests mediation and the other party agrees.

Comment

[1] The mediation program described in these rules is part of this jurisdiction's comprehensive lawyer regulatory system. The comprehensive system includes: [a lawyer discipline and disability system, a client protection fund, mandatory arbitration of fee disputes, mediation, law office management assistance, and lawyer assistance programs].

[2] Since mediation is a process that works by building consensus and agreement, the mediation process can preserve existing client-lawyer or other fiduciary relationships by allowing both sides to air their grievances and work together on a solution agreeable to all parties. When handled by a skilled mediator, the process can be simple and efficient, saving time and money for both parties. The lawyer's willingness to have a third party assist in resolving the dispute can demonstrate to the client that the lawyer's intention is to act in the client's best interest.

[3] Mediation is not suitable when the dispute involves an allegation of lawyer misconduct, which, if true, would warrant a sanction restricting the lawyer's license to practice law. Mediation is appropriate when the dispute involves no allegation of lawyer misconduct or an allegation of lesser misconduct as defined in [jurisdiction's rules of disciplinary enforcement]. It is appropriate because there is little or no injury to a client, the public, the legal system, or the profession, and there is little likelihood of repetition by the lawyer.

[4] Examples of disputes that might be referred to mediation include allegations of a lawyer's failure or refusal to return a client's file based on a fee dispute with the client, release a lien on a client's recovery in a case in which the lawyer has been succeeded by another lawyer, withdraw from representation upon being discharged by the client, conclude a legal representation by preparing an essential dispositive document, such as the findings of fact and conclusions of law in a divorce or the final account in an estate, return an unearned fee or a portion of the fee, comply with his or her agreement with a medical provider on the client's behalf or communicate concerning the status of a matter.

[5] Other examples of situations in which the parties might agree to voluntary mediation could include allegations of a client's failure to pay or fulfill the contract, pay for costs (including future costs) or communicate with the lawyer.

[6] The primary purpose of the program is to resolve complaints referred from the jurisdiction's lawyer disciplinary agency. Therefore, such referrals should be given priority over voluntary mediations.

[7] Mediation can be used to complement fee arbitration proceedings. The Commission may accept jurisdiction in a dispute in which a fee arbitration proceeding is pending but has not yet begun. The intention is to solve the dispute in a less formal way, if possible, not to refer complainants back and forth between the two programs.

Rule 2. MEDIATION COMMISSION

- A. Appointment of Commission.** The [highest court of the jurisdiction] shall appoint a Mediation Commission to administer the Mediation Program. The [highest court of the jurisdiction] shall designate one member to serve as Chair of the Commission.
- B. Composition.** The Commission shall consist of [six] members, of whom at least one-third shall be nonlawyers. Members shall be appointed for terms of three years except where a vacancy has occurred in which event appointments shall be for the unexpired portion of the term being filled. Appointments shall be on a staggered basis so that the number of terms expiring shall be

approximately the same each year. No members shall be appointed for more than two consecutive full terms, but members appointed for less than a full term (either originally or to fill a vacancy) may serve two full terms in addition to such part of a term.

- C. **Duties of the Commission.** The Commission shall have the following powers and duties to:
- (1) **appoint and remove mediators and provide appropriate training;**
 - (2) **interpret these rules;**
 - (3) **establish written procedures not inconsistent with these rules;**
 - (4) **issue an annual report and periodic policy recommendations, as needed, to the [highest court of the jurisdiction] regarding the program;**
 - (5) **maintain all records of the Mediation Program;**
 - (6) **determine challenges for cause where a mediator has not voluntarily acceded to a challenge;**
 - (7) **educate the public and the bar about the Mediation Program;**
 - (8) **perform all acts necessary for the effective operation of the program; and**
 - (9) **establish fee schedules and oversee financial matters.**

Comment

[1] Overall authority to administer the Mediation Program is delegated by [the highest court of the jurisdiction] to the Commission. The court should ensure diversity in the membership of the Commission.

[2] The Commission has authority to limit the types of matters accepted for mediation. Personal disputes and business matters where one of the parties is a lawyer but the allegations do not involve the practice of law are not appropriate for mediation under these rules. Mediation of disputes between lawyers is not precluded by these rules where the complaint otherwise meets the guidelines of matters that are appropriate for mediation.

[3] The Commission has the authority to establish reasonable fees for the program and also to waive fees in cases of hardship. No fee should be charged a client if the charging of the fee would unduly restrict the client's access to the mediation process. Additionally, in mediations referred by [the lawyer disciplinary agency], the client should not be charged a fee for participating in the mediation.

[4] With respect to the funding of the mediation program, it is envisioned that there will be minimal costs involved: lawyer and nonlawyer volunteers will be serving as mediators. The Commission may delegate the day-to-day administration of the Mediation Program to staff assigned to the lawyer disciplinary agency. However, a state or local bar association could administer this component of the lawyer regulation system.

Rule 3. MEDIATORS

- A. **List of Approved Mediators.** The Commission shall maintain a list of approved mediators, both lawyers and nonlawyers, and shall adopt written standards for the appointment of the mediators. Mediators should represent all segments of the profession and the general population, including diversity on the basis of race, gender, and practice setting. Mediators shall be appointed for terms of [three] years and may be reappointed. The Commission may remove a mediator from the list of approved mediators for good cause, and may appoint a replacement member to serve the balance of the term of the removed member.
- B. **Conflicts of Interest.** Within [20] days of the notification of appointment as a mediator, and prior to the initiation of the mediation, the mediator shall notify the Commission if he or she has previously acted as a mediator in the proceeding or in any other related proceeding or of any conflict of interest with a party to the mediation as defined in the [*Code of Judicial Conduct*] with respect to part-time judges. Upon notification of the conflict, the Commission shall appoint a replacement from the list of approved mediators.
- C. **Challenges for Cause.** If either party has cause to object to participation by a mediator, a substitute shall be appointed by the Commission. A challenge for cause shall be filed within [15] days after service of the notice of appointment. A mediator shall accede to a reasonable challenge and the Commission shall appoint a replacement. If a mediator does not voluntarily

accede, the Commission shall decide whether to appoint a replacement. The decision of the Commission on challenges shall be final.

- D. Duties.** The mediator shall have powers and duties to:
- (1) grant extensions of time as deemed appropriate;
 - (2) reschedule or terminate the mediation if a party fails to appear; and
 - (3) perform all acts necessary to conduct an effective mediation conference.

Comment

[1] Written standards for the appointment of mediators should ensure appropriate training and experience for mediators as well as diversity in the background and experience of the mediators. Mediators should also be dispersed throughout the jurisdiction to increase access to the mediation process.

[2] Mediators should be required to attend an appropriate training course, as determined by the Commission, which should include training in mediation theory, skills and the applicable provisions of the rules of professional conduct.

[3] Mediators exercise a quasi-judicial role and should, therefore, be disqualified upon the same grounds and conditions applicable to part-time judges. The decisions of the mediators should be free from any appearance of outside influence.

Rule 4. THE PROCESS

- A. Commencement of Mediation.**
- (1) **Referral from Lawyer Disciplinary Agency.** Within [15] calendar days after receipt by the Commission of a mediation referral from [the lawyer disciplinary agency], the Commission shall mail to both the lawyer and the complainant a copy of these rules and an agreement to mediate, together with a notice that shall include the name, address and telephone number of the mediation program and the date on which the referral for mediation was received. If the signed agreement to mediate is not returned to the Commission by both parties within [30] calendar days of mailing, the Commission shall close the file, notify the parties that it is closing the file because one or both parties failed to return the agreement, and inform the [lawyer disciplinary agency] of the identity of the party or parties who did not consent to mediation.
 - (2) **Voluntary Mediation.** Within [15] calendar days after receipt by the Commission of the approved written application for voluntary mediation of a dispute and a signed agreement to mediate, the Commission shall notify the other party of the request and shall forward to that party an agreement to mediate, together with a copy of these Rules and a copy of the written application. If the signed agreement is not returned to the program by the other party within [30] calendar days of mailing, the Commission shall close the file and notify the requestor that the other party did not consent to mediation.
- B. Assignment of Mediators.** The Commission shall notify the parties of the assignment of a mediator within [15] calendar days after receipt of the fully executed agreement to mediate. The notice shall include the name, address and telephone number of the mediator assigned. The mediator shall be assigned at random from the available pool of qualified individuals. Upon withdrawal or removal of a mediator, the Commission shall notify the parties within [10] calendar days of the name, address and telephone number of a new mediator.
- C. Mediation Hearing Date.** Within [15] calendar days after the date of mailing of the notice of the assignment of a mediator, the mediator shall arrange a mediation conference date which shall be scheduled to take place within [30] calendar days after the assignment notice mailing date, unless both parties to the mediation agree to a longer date. The mediator shall promptly notify the parties and the Commission of the place, date and time of the conference.
- D. The Conference.**

- (1) **Only the parties to the mediation, their lawyers, if any, and the mediator are required to be present during the mediation, but the mediator shall have authority to determine if others may be present at and participate in the mediation.**
- (2) **The mediator shall have the authority to meet separately with the parties.**
- (3) **If all parties and the mediator agree, the mediation may be conducted by telephone. In cases of hardship, the mediation may be conducted by telephone at the discretion of the mediator even if all parties do not agree.**
- (4) **If upon completion of the mediation, the parties have an agreement, the mediator shall reduce the agreement of the parties to writing. The parties shall sign as many originals as there are parties to the mediation. A copy of the signed agreement shall be made for the Commission's records. The mediator shall report to the Commission on the Mediation Summary Report form, which will indicate if the dispute was resolved, was not resolved, or did not proceed because a party did not appear (with an indication of which party did not appear). Such agreement and/or report shall be submitted within [15] calendar days after the conclusion of the mediation.**
- (5) **In the case of any mediation referred from the disciplinary agency, the following materials shall be transmitted to the [lawyer disciplinary agency] at the conclusion of the mediation:**
 - a. **A duplicate original of the signed mediation agreement described in Rule 4.D.4 above; and**
 - b. **the completed Mediation Summary Report form.**

Comment

[1] The overwhelming majority of complaints made against lawyers allege instances of lesser misconduct. Summary dismissal of these complaints is one of the chief sources of public dissatisfaction with the lawyer regulation system. These cases seldom justify the resources needed to conduct formal disciplinary proceedings and should be removed from the disciplinary system and handled administratively.

[2] The mediation program established by these rules is designed to receive cases from a number of sources: the central intake office; the disciplinary agency; other agencies within the lawyer regulation system; the courts; or directly from the parties. Referrals from the disciplinary agency will usually be part of a diversion program or an agreement in lieu of discipline, in which a lawyer agrees to mediate a dispute with the understanding that the disciplinary matter will be dismissed upon successful completion of the mediation. Agreement of both the client and the lawyer is required for a matter to be referred to mediation from the disciplinary agency. Matters that come to the mediation program from the central intake office, other agencies, or directly from the parties are voluntary as described in these rules.

[3] The mediator is authorized to determine the rules by which the mediation will proceed. The mediator should conduct the conference informally. At the outset, the mediator should make clear to the parties that the mediator is serving as a mediator and not a judge. The mediator's role is to facilitate communication and suggest ways of resolving the dispute; the mediator is not to impose a settlement on the parties. The mediator should make every effort to hear all the relevant facts, review all the relevant documents, become familiar with any controlling legal principles and seek to bring about an acceptable compromise between the parties. The mediator should make sure that any proposal offered for resolution of the matter is clearly understood by the parties and perceived to be fair.

Rule 5. CONFIDENTIALITY

- A. **Except as provided in Rule 4.D.5 above, and Rule 5.B below, all communications, negotiations or settlement discussions by and between participants and/or mediators in the mediation shall remain confidential. All parties attending a mediation shall sign a written agreement that the proceeding will be confidential.**
- B. **Notwithstanding Rule 5.A above, lawyer mediators have a duty to, and nonlawyer mediators should, report conduct that would be reportable under the applicable rules of professional conduct or other applicable statutes or rules.**

Comment

[1] Confidentiality in a mediation hearing is of paramount importance. Nevertheless, the need to report lawyer misconduct takes precedence. Lawyer mediators have a duty to, and nonlawyer mediators should, report conduct that would be reportable under the jurisdiction's applicable rules or statutes. A lawyer having knowledge that another lawyer has committed a violation of the [rules of professional conduct] that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, must inform the appropriate professional authority. Nonlawyer mediators should refer to this standard in determining their responsibility to report lawyer misconduct. The fact that mediators have a duty to report lawyer misconduct should not have a chilling effect on those parties who are sincere in availing themselves of the benefits of mediation. All mediators may also be required by the laws in their jurisdiction to report to the appropriate agency evidence of other types of misconduct, i.e., child abuse or criminal conduct, that comes to light during a mediation.

Rule 6. IMMUNITY

Communications to the Commission, mediators, or disciplinary counsel relating to lawyer misconduct or disability and testimony given in the proceedings shall be absolutely privileged, and no lawsuit predicated thereon may be instituted against any client or witness. Members of the Commission, mediators, disciplinary counsel, or any person acting on their behalf, and staff shall be immune from suit for any conduct in the course of their official duties.

Comment

[1] The personnel involved in the mediation process are an integral part of the judicial process and are entitled to the same immunity, which is afforded prosecuting lawyers. Immunity protects the independent judgment of the mediation personnel and avoids diverting the attention of its personnel as well as its resources toward resisting collateral attack and harassment. A policy of conferring absolute immunity encourages those who have some doubt about a lawyer's conduct to submit the matter to the proper agency, where it may be examined and determined.