

## **Report**

### **Model Standards of Conduct for Mediators**

#### **Introduction to the Model Standards of Conduct for Mediators**

The Model Standards of Conduct for Mediators (hereinafter “the Standards”) are a foundational set of ethical guidelines for mediator practice. They are intended to guide individual mediators, including both lawyers and non-lawyers in their practice; provide a model for entities, such as courts, professional organizations, and providers of mediation services, that establish standards of conduct for mediators; and, inform potential and actual participants in mediation about what they should expect in mediation. The undersigned sections of the American Bar Association recommend the Model Standards of Conduct for Mediators (2005 version) for adoption by the ABA House of Delegates to further these goals. A copy of the proposed Standards is attached.

#### **Development of the Model Standards of Conduct for Mediators**

The original Model Standards of Conduct for Mediators (hereinafter “original Standards,” available at [www.abanet.org/dispute/modelstandardardsofconduct.doc](http://www.abanet.org/dispute/modelstandardardsofconduct.doc)) were developed between 1992 and 1994 by representatives from the American Bar Association Section of Dispute Resolution, the American Arbitration Association, and the Society of Professionals in Dispute Resolution (which has since merged with other organizations to form the Association for Conflict Resolution). The original Standards were adopted by at least eight state programs in total or with slight variations as their guide for mediator conduct, and multiple educational texts, including law school casebooks, reference the original Standards in their discussion of ethical norms for mediators. The original Standards were approved by the Dispute Resolution and Litigation Sections of the ABA, but they were not submitted to the House of Delegates. The Standards presented here are the first to come before the House of Delegates for consideration. The House of Delegates did approve the Model Standards of Practice for Family and Divorce Mediation in February 2001. The family standards borrowed language from the "original Standards" and adopted a similar structure, but gave special guidance to practitioners in family cases.

In September 2002, two representatives from each of the three drafting organizations for the original Standards gathered to review the original Standards and determine whether there was a need to update them. During the intervening decade the use of mediation had grown exponentially. State jurisdictions now 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 with more than 2,200 statutory provisions or court rules now shaping mediation’s use. Partly in response to this development, leaders in the mediation field initiated efforts in the late 1990s that led to the development of the Uniform Mediation Act, which was approved by the ABA House of Delegates. The use of mediation in court settings has expanded to include case types ranging from multi-million dollar medical malpractice claims to small claims cases over bad haircuts, from environmental cases involving acre upon acre of land to backyard squabbles over trees, from class actions to the entire range of family cases, including

child custody, divorce, child protection, truancy, etc. In contexts other than courts, such as in dispute avoidance and resolution systems in workplace contexts, in peer mediation programs in schools, and in facilitated dialogue to resolve social policy conflicts, mediation's use has become increasingly prominent. The backgrounds of individual mediators are also quite varied, including lawyers; former judges; mental health, financial, human resource, engineering, and other professionals; and including not only paid mediators, but many thousands of volunteers. Time commitments range from full-time mediators to those who mediate only rarely.

The representatives from the original drafting organizations believed it important to update the original Standards in a way that addresses the changing state of mediation practice and mediators. They convened a Joint Committee to initiate this review. The Joint Committee members included R. Wayne Thorpe and Susan M. Yates from the American Bar Association Section of Dispute Resolution; Eric P. Tuchmann and John H. Wilkinson from the American Arbitration Association; and Sharon B. Press and Terrence T. Wheeler from the Association for Conflict Resolution. The Committee invited Dr. Joseph B. Stulberg of Ohio State University Moritz College of Law to act as reporter.

The Joint Committee found much to admire and retain in the original Standards, including the basic architecture of the nine standards. However, they believed the original Standards could be improved by clarifying the formatting; distinguishing the level of guidance provided to the mediator by the targeted use of the verbs "shall" and "should;" shaping the Standards so they guide the mediator's conduct rather than the conduct of other mediation participants; providing guidance for mediator conduct in situations when the operation of two or more Standards might conflict with one another; and otherwise updating the Standards to reflect the current state of mediation practice.

### **The Drafting Process**

The Joint Committee convened for the first time in September 2002. For the next two and a half years the Joint Committee worked in a variety of ways: holding six in-person multi-day drafting meetings, conducting telephonic committee meetings, sending emails, considering extensive input from outside the Joint Committee, conducting public sessions at four national conferences in Florida, Texas, California and New York and other local and regional conferences and meetings, publishing drafts and eliciting comments on a web site, corresponding with dozens of constituency organizations to solicit input, and issuing four drafts to the public.

Because of the importance of these Standards, not only to those in the mediation community, but also to the public and to the bar, the Dispute Resolution Section and Litigation Section decided to bring the Revised Standards to the House of Delegates for adoption. The Dispute Resolution and Litigation Sections have worked together to refine the last two drafts of the Standards and prepare them for House of Delegates submission.

The result of these efforts is a final draft which is now being presented to the House of Delegates. The Joint Committee has agreed unanimously and enthusiastically to recommend the draft to its respective organizations for adoption. Because of the value of uniform mediation standards, each of the drafting organizations is seeking adoption of the Standards as written, in order to avoid possible enactment of conflicting versions of the Standards. The Litigation Section

and the Dispute Resolution Section are actively supporting the adoption of the Model Standards of Conduct for Mediators by the ABA House of Delegates. In addition, the Section of Labor and Employment has endorsed the Standards.

### **Summary of the Model Standards of Conduct for Mediators**

The Model Standards of Conduct for Mediators presented here are comprised of nine Standards, preceded by a Preamble and a Note on Construction. The first page of the Standards provides space for an effective date. The effective date will be the date on which the last of the three original participating organizations adopts the Standards.

The Reporter for the Standards has prepared thorough Reporter's Notes, which explain in detail much of the Joint Committee's analysis in preparing the Standards. The Reporter's Notes themselves provide a fuller explanation of their function, but in short they can be considered as a "legislative history" of the Revised Standards. They are especially thorough in explaining the process used by the Joint Committee in producing the Standards presented here. The Reporter's Notes can be found at <http://moritzlaw.osu.edu/dr/msoc/index.html>. (This document and the Executive Summary both borrow heavily from the Reporter's Notes.)

The following is an effort briefly to summarize provisions of the Standards. The effort to summarize in a small amount of space and relatively fewer words than used in the Standards necessarily cannot be totally faithful to both letter and spirit of the Standards. Accordingly, the Standards are attached in full, and we urge the reader to read them in addition to this summary.

#### **Preamble**

The Preamble puts the Standards in context, talks about why they were written, and defines mediation and its possible purposes. One important thing about the Preamble is that it defines mediation somewhat broadly as "...a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision making by the parties to the dispute."

#### **Note on Construction**

The Note on Construction advises the reader to use the Standards in their entirety and not to attach significance to their order. It goes on to define "shall" and "should" as used in the Standards, and "mediator" to include co-mediation. It notes that the beginning and ending of mediation are not defined. The newly clarified definitions of "shall" and "should" are some of the more important aspects of the Note.

The Note then addresses the balance of these Standards with other possible authorities – such as law, court rules, regulations, other professional rules, and other agreements of the parties – which may conflict with, or take precedence over, the Standards. It advises mediators to comply with the spirit of the Standards whenever possible, and to comply with any Standards that are not in conflict with the other authorities. This latter concept supports mediators in their efforts to abide by the Standards, and also appropriately respects the power of authorities outside the mediation and the dual responsibilities that some mediators bear.

The Note ends with a warning that while these Standards alone do not have any power until they

are adopted by an entity with authority, they could be interpreted by a court to be the standard of care for mediators.

#### Standard I: Self-Determination

The first standard sets self-determination as the core principle of mediation, and makes clear that this principle applies at any stage of mediation, including mediator selection, process design, and participation in or withdrawal from the process, as well as when determining outcomes. The first standard provides an important reminder to mediators that there are some limits to self-determination and they may need to balance party self-determination with other Standards, such as the duty to conduct a quality process. It also speaks to a mediator's responsibility to inform or remind parties of the option of consulting other professionals to assist them in making informed choices.

This standard closes with a reminder to mediators that they need to be careful not to undermine party self-determination due to various inappropriate influences, "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

The second standard addresses mediator impartiality and states that mediators must refuse to mediate if they cannot be impartial; conduct mediations impartially; and withdraw if they cannot remain impartial. The standard goes on to say that mediators not only must act impartially, they must look impartial, and avoid gifts that raise questions about impartiality. Some latitude is provided for small items or services that would facilitate the mediation or respect cultural expectations, so long as impartiality was not affected.

#### Standard III: Conflicts of Interest

The third standard addresses conflicts of interest. In short, Standard III provides that a mediator shall avoid a conflict of interest or appearance thereof during and after a mediation; make reasonable inquiry to determine actual and potential conflicts; and disclose actual and potential conflicts reasonably known to the mediator, even if it is discovered after accepting the mediation. After disclosure, and with agreement of the parties, a mediator may proceed unless to do so would undermine the integrity of the process. Finally, Standard III prohibits post-mediation relationships that "would raise questions about the integrity of the mediation."

#### Standard IV: Competence

The fourth standard discusses mediator competence in terms of party expectations and party choice: a mediator shall only mediate when able to do so consistent with reasonable expectations of parties, and parties may select any person as a mediator provided the parties are satisfied with the mediator's competence and qualifications.

#### Standard V: Confidentiality

The fifth standard addresses at least three key aspects of confidentiality while recognizing the area as one that is sometimes not clearly understood between mediator and participants. First, with narrowly defined exceptions, a mediator must maintain confidentiality of all information obtained by the mediator in a mediation. Second, a mediator must keep confidential any

information obtained in a private caucus, unless the party revealing the information consents to disclosure. Third, because of the too common occurrence of confusion about what governs confidentiality in a given mediation, the mediator is admonished to promote understanding among the participants of how confidentiality applies in each case.

#### Standard VI: Quality of the Process

The sixth standard requires a mediator to conduct a mediation “in a manner that promotes diligence, party participation, procedural fairness, party competency and mutual respect....” Standard VI, A, 1-10 contains ten paragraphs governing mediator conduct with respect to these various components of a “quality process.” These paragraphs concern: mediator availability; mediator involvement in who attends; mediator promotion of honesty and candor and prohibition against mediator misrepresentation; mixing mediator role with that of other professionals; prohibition against mislabeling process as mediation to obtain protections of mediation; permission for mediator to recommend another dispute resolution process; steps by mediator to avoid use of mediation to further criminal conduct; and, mediator responsibility as to party not fully comprehending any aspect of the mediation. Standard VI, B, which is new to the Standards, calls upon a mediator to take appropriate steps, including postponement, withdrawal or termination if the mediator learns of domestic abuse or violence among parties. Finally, if a mediator learns of any participant conduct that jeopardizes conducting a mediation consistent with the Standards, then the mediator must take appropriate steps as well.

#### Standard VII: Advertising and Solicitation

The seventh standard deals with advertising and solicitation. It requires a mediator to be truthful and not misleading in advertising and soliciting; to avoid soliciting in a manner that gives an appearance of partiality or undermines the integrity of the process; and to avoid revealing names of participants without their consent.

#### Standard VIII: Fees and Other Charges

The eighth standard relates to fees and other charges. A mediator must provide true and complete information about fees and expenses. A mediator should develop fees in view of certain listed factors and should set forth the fee arrangement in writing unless the parties request otherwise. A mediator must not charge fees in a manner that impairs impartiality, although a mediator may accept fees in unequal amounts from the parties. Such an arrangement is only permissible where it would not adversely impact mediator impartiality.

#### Standard IX: Advancement of Mediation Practice

The ninth Standard addresses the mediator’s responsibility to the field of mediation. It presents an expectation that a mediator should advance the practice of mediation and provides five examples of ways in which a mediator might do so (e.g., pro bono mediations, public education and mentoring.) It also states that mediators should be respectful of differing views in the mediation field.

### **Conclusion**

The original version of the Model Standards of Conduct for Mediators was foundational for mediator standards that followed it. Adopting these newly revised and updated Standards will assist in the ongoing development and provision of the ethical practice of mediation and will

encourage more courts and other entities to adopt these Model Standards of Conduct for Mediators as their own.

Respectfully submitted,

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August 2005