

Executive Summary

Introduction to the Model Standards of Conduct for Mediators:

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. The Standards were developed beginning in September, 2002, by a Joint Committee of representatives of the ABA Section of Dispute Resolution, the American Arbitration Association, and the Association for Conflict Resolution. A copy of the Standards is attached to the accompanying Recommendation.

Summary of the issue which the Recommendation addresses:

The House of Delegates has never been asked to approve a comprehensive body of mediator standards of conduct covering mediators in all practice settings. The original Model Standards of Conduct for Mediators (hereinafter “original Standards,” available at www.abanet.org/dispute/modelstandardardsofconduct.doc) were developed between 1992 and 1994 by representatives from the same organizations that developed these Standards. The original Standards were endorsed by the ABA Section of Litigation, in addition to the sponsoring organizations, but they were not submitted to the House of Delegates. The original standards have been widely accepted as a source of guidance to mediators. (The House of Delegates did approve the Model Standards of Practice for Family and Divorce Mediation in February 2001. The family standards have a similar structure as these Model Standards, but give special guidance to practitioners in family cases.)

Today, mediation has become commonplace not only in the legal system but also in many other walks of life. Parties and their counsel utilize mediation routinely in litigated cases and in pre-litigation disputes; in purely voluntary mediations and those directed by the court; in civil, domestic and criminal cases; in federal, state and local courts; in the simplest two-party cases and the most complex cases, with dozens or more parties; and, in mediations lasting multiple days to an hour or less. Disputants frequently use mediation in the workplace, in schools, in healthcare, in public policy formulation, and in a variety of other settings outside of the legal context. The backgrounds of mediators are 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.

In all of mediation’s many contexts, mediators, parties, lawyers, courts, and the general public have a compelling need for a comprehensive, broadly accepted set of standards governing mediator conduct.

How the proposed policy position will address the issue:

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. If adopted, they would be the most widely approved standards

of conduct for mediators, and as such they would be tremendously beneficial to mediators, parties, lawyers, courts, and the general public.

The Model Standards of Conduct for Mediators, as summarized below, are comprised of a Preamble, a Note on Construction, and nine standards. Thorough Reporter's Notes are available at <http://moritzlaw.osu.edu/dr/msoc/index.html>.

- The Preamble and Note on Construction address the definition of mediation (“...a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision making by the parties to the dispute.”); other definitions; the need to balance the Standards with other possible authorities – such as law, court rules, regulations, other professional rules, and other agreements of the parties; and a note that while these Standards 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.
- The first standard establishes self-determination as the core principle of mediation, which applies both to process issues, as well as outcomes.
- The second and third standards address impartiality and conflicts of interest. They require that mediators refuse to mediate if they cannot be impartial, and withdraw if they cannot remain impartial. The conflict of interest standard requires that mediators avoid conflicts and appearances of conflicts during and after mediations, that they make inquiries to identify possible conflicts, and that they disclose actual or potential conflicts.
- The fourth standard on competence defines mediator competence principally in terms of party expectations and party choice.
- The fifth standard provides guidance on a mediator's obligations relating to confidentiality: (1) maintain confidentiality of all information obtained by the mediator; (2) keep confidential any information obtained in a private caucus, unless the party consents to disclosure; and (3) promote understanding among the participants of how confidentiality applies in each case.
- The sixth standard, addressing the quality of the process, requires a mediator to conduct a mediation “in a manner that promotes diligence, party participation, procedural fairness, party competency and mutual respect....” It then provides specific guidance about quality.
- The seventh and eighth standards address advertising, solicitation and fees. They call for truthfulness and integrity, and provide other guidance about how to maintain the overall intent of the standards in the business aspects of mediation.
- The final standard addresses the mediator's responsibility to the field of mediation.

Summary of any minority views of opposition which have been identified:

None.

Respectfully submitted,

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