

Proposal for Revising Michigan's Standards of Conduct for Mediators

Drafted by the Standards of Conduct Subcommittee
of the Mediator Confidentiality and Standards of
Conduct Committee

Report to the State Court Administrator

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Introduction

In November 2008, the State Court Administrator appointed the 26-member Mediation Confidentiality and Standards of Conduct Committee to examine mediation confidentiality practices and to recommend court rule revisions that would improve mediation practice.¹

As part of the committee’s work, a subcommittee was convened to assess whether the Mediator Standards of Conduct adopted by the State Court Administrator pursuant to MCR 2.411(G) and 3.216(K) in 2000 should be revised in light of revisions to the American Bar Association (ABA) Mediator Standards of Conduct adopted in 2005.² Subcommittee members included Anne Bachle Fifer, Susan Butterwick, Barbara Johannessen, and Zena Zumeta, all of whom are attorneys, mediators, and mediator trainers.

The subcommittee recognized that there were, in fact, two sets of national mediator standards of conduct. Addressing primarily general civil mediation practice, the “Model Standards of Conduct for Mediators,” (1994, rev. 2005) were jointly adopted by the ABA, American Arbitration Association, and the Association for Conflict Resolution.³ Addressing domestic relations mediation practice, the “Model Standards of Practice for Family and Divorce Mediation,” (2000) developed by the Symposium on Standards of Practice were approved by the ABA House of Delegates in February 2001, and have been adopted by the Association of Family and Conciliation Courts.⁴ Notably, both sets of standards have been approved by the ABA.

That two distinct, but similar, sets of mediator standards exist appeared to the subcommittee to assume that mediators were either mediating in one practice area or the other

¹ A list of committee members appears as Appendix 1.

² The current Michigan Standards of Conduct for Mediators document appears as Appendix 2.

³ The “Model Standards of Conduct for Mediators” appears as Appendix 3.

⁴ The “Model Standards of Practice for Family and Divorce Mediation” appears as Appendix 4.

and that a separate set of standards would apply to each practice area. In reality, however, many mediators provide mediation services in both general civil and domestic relations cases. Additionally, cases originally labeled “general civil” frequently involve “domestic relations” components, and vice versa. In assessing the extent to which mediation standards *should* differ and the *need* for different standards whether mediating with general civil or domestic relations litigants, the subcommittee elected to undertake an effort to combine the substantive components of both documents into one set of standards.

The subcommittee convened via teleconference ten times and met in person for one full day session. Numerous drafts were exchanged and commented upon between teleconferences. The subcommittee established for itself a number of “guiding principles” in its drafting. These included: (1) adhering to and adopting the language of the model standards to the extent possible; (2) minimizing duplication in drawing from two sets of standards, unless duplication was necessary to emphasize that a standard applies across several issue areas; (3) carefully distinguishing between “parties” and “participants”; (4) avoiding general statements and mediation practice suggestions that appear in the model standards; and (5) treating each statement as a standard, without additional commentary.

The subcommittee left unchanged the section of the current Michigan Standards of Conduct for Mediators pertaining to mediation confidentiality because a separate report, issued by the Mediation Confidentiality and Standards of Conduct Committee, recommends that a new court rule replace the current confidentiality provisions of MCR 2.411(C)(5) and 3.216(H)(8). If a new rule is adopted, Standard V would be amended to reflect revisions to the court rules.

A choice remained whether to have the proposed standards considered by the full Mediation Confidentiality and Standards of Conduct Committee, or to defer consideration to a successor committee expressly convened to consider and receive public comment on the

proposed standards.

For a number of reasons, the committee elected to defer consideration of the proposed standards to a successor work group. First, the scope of the standards review and the drafting exercise that followed substantially exceeded that originally anticipated. Second, having the committee review the subcommittee's work in depth, and inviting and reviewing public comment would have extended the committee's tenure for a considerable period of time. And third, given the complexity and significance—possibly national in scope—of the subcommittee's work, the committee believed that the proposal warranted review by a work group convened to focus solely on mediator standards.

This proposal is thus not issued as the work product of the full Mediation Confidentiality and Standards of Conduct Committee, but rather as the separate work product of its subcommittee. The drafters view the product as an initial effort to revise Michigan's current mediator standards of conduct.

The State Court Administrative Office is encouraged to appoint a successor committee to review this work and to provide recommendations to the State Court Administrator for adopting a revised set of standards of conduct for Michigan mediators.

Model Standards of Conduct 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 such self-determination at any stage of a mediation.
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.
 3. A mediator shall continuously assess the capacity of the parties to mediate. A mediator shall make appropriate modifications to the process if there is concern about a party's ability to make voluntary and uncoerced decisions. A mediator shall terminate a mediation when a mediator believes a party cannot effectively participate.
- B. A mediator's commitment shall be to the parties and the process. 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, or the media.

Standard II. Impartiality

- A. A mediator shall conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality. Impartial means freedom from favoritism, bias or prejudice in word, action or appearance, and includes a commitment to assist all participants as opposed to any one individual.
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.
 2. A mediator should neither give nor accept a gift, favor, loan, or other item of value that raises a question as to the mediator's actual or perceived impartiality.

3. A mediator may accept or give de minimis gifts or incidental items or services that are provided to facilitate a mediation or respect cultural norms so long as such practices do not raise questions as to a mediator's actual or perceived impartiality.
- B. A mediator shall decline a mediation or withdraw from a mediation if the mediator cannot conduct it in an impartial manner, regardless of the express agreement of the parties.

Standard III. Conflict of Interest

- A. A mediator shall avoid a conflict of interest or the appearance of a conflict of interest both during and after the mediation. A conflict of interest is a dealing or relationship that might create an impression of possible bias or could reasonably be seen as raising a question about impartiality or self-serving on the part of the mediator.
- 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. The duty to make reasonable inquiry is a continuing duty.
- C. A mediator shall promptly disclose all actual and potential conflicts of interest and grounds of potential bias or partiality reasonably known to the mediator. A mediator should resolve all doubts in favor of disclosure. Where possible, such disclosure should be made prior to the start of a mediation and in time to allow the participants to select an alternate mediator. The duty to disclose is a continuing duty during and after the mediation.
- D. After disclosure, the mediator shall decline to mediate unless all parties choose to retain the mediator. If all parties agree to mediate after being informed of conflicts, 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 express agreement of the parties to the contrary.
- F. A mediator shall not establish a personal or another professional relationship with any of the participants, during or after the mediation, that would raise legitimate questions about the integrity of the mediation process, or impartiality of the mediator, without the consent of all parties. When a mediator develops a personal or another professional relationship with a mediation participant or organization, the mediator should consider factors such as time elapsed since the mediation, the nature of the relationship established, and services offered, when determining whether the relationship might create a perceived or actual conflict of interest.

- G. A mediator should avoid conflicts of interest in recommending the services of other professionals.
- H. A mediator shall not use information about participants obtained in a mediation for personal gain or advantage.

Standard IV. Competence

- A. A mediator shall mediate only when the mediator has the necessary competence to satisfy the reasonable expectations of the parties. A person who offers to serve as a mediator creates the expectation that the person is competent to mediate effectively.
 - 1. Training in mediation process and techniques, dynamics of conflict, and substantive issues and law; experience in mediation; skills in negotiation and constructive communication; understanding of cultural and diversity issues; and other qualities are often necessary for mediator competence.
 - 2. A mediator should have available for the parties information relevant to the mediator’s training, education, experience, and approach to conducting a mediation.
- B. A mediator shall recognize a situation involving child abuse or neglect, vulnerable adult abuse or neglect, or domestic abuse. The mediator shall take appropriate steps to shape the mediation process accordingly and shall not undertake the mediation without appropriate and adequate training.
- C. 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, requesting appropriate assistance or withdrawing.
- D. If a mediator’s ability to conduct a mediation is impaired by drugs, alcohol, medication, or otherwise, the mediator shall not conduct the mediation.
- E. A mediator should attend educational programs and trainings and should engage in self-assessment and peer consultation to maintain and enhance the mediator’s knowledge and skills related to mediation.

Standard V. Confidentiality⁵ Statements made during the mediation, including statements made in written submissions, may not be used in any other proceedings,

⁵This section reflects current court rule confidentiality provisions. In the event that the Michigan Supreme Court adopts amendments to MCR 2.411 and 3.216, this section would be changed to reflect the following: “A mediator should adhere to the Michigan Court Rule on confidentiality in mediation, which provides: [insert new rule].”

including trial. Any communications between the parties or counsel and the mediator relating to a mediation are confidential and shall not be disclosed without the written consent of all parties. This prohibition does not apply to:

- (a) the report of the mediator under subrule MCR 2.411 (C)(3) or 3.216 (H)(6),
- (b) information reasonably required by court personnel to administer and evaluate the mediation program,
- (c) information necessary for the court to resolve disputes regarding the mediator's fee, or
- (d) information necessary for the court to consider issues raised under MCR 2.410(D)(3) or 3.216 (H)(2).

Standard VI. Quality of the Process.

The mediator shall conduct the mediation in a manner that protects the quality of the mediation process.

- A. Process: 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. Diligence and timeliness. A mediator shall mediate in a diligent and timely manner.
 - a. A mediator should agree to mediate only when the mediator is prepared to commit the attention essential to an effective mediation.
 - b. A mediator should accept cases only when the mediator can satisfy the reasonable expectation of the parties concerning the timing of a mediation.
 - 2. Participants and participation. A mediator shall facilitate the presence of the appropriate participants and their understanding of the mediation process, continuously assess the parties' capacity to mediate, and structure the mediation process so that the parties make decisions based on sufficient information and knowledge.
 - a. The presence or absence of persons at a mediation should be determined by the parties and the mediator unless the court orders the presence of another person.

- b. The parties and their advocates should sign a written agreement to mediate that includes the mediator's fee, a description of the process, the role of the mediator, and the extent of confidentiality. Other participants should sign a written agreement regarding confidentiality.
 - c. A mediator should continuously assess the capacity of the parties to mediate. If a party appears to have difficulty comprehending the process, issues, or settlement options, or appears to have difficulty participating in 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. If the mediator determines that a party does not have the capacity to mediate even with accommodations, modifications or adjustments, the mediator shall not proceed with the mediation.
3. Procedural fairness. A mediator shall conduct the mediation with procedural fairness.
- a. The mediator should provide participants with an overview of the process and its purpose, including distinguishing it from other processes, the consensual nature of mediation, the role of the mediator as an impartial facilitator who cannot impose or force settlement, the use of joint and separate sessions, and the extent of confidentiality.
 - b. A mediator who has an obligation or policy to report suspected abuse or neglect of children or vulnerable adults should inform the participants as soon as practicable.
 - c. The mediator should facilitate the acquisition, development, and disclosure of information to promote parties' informed decision-making.
 - d. A mediator shall not knowingly misrepresent any material fact or circumstance in mediation.
 - e. The mediator should recommend where appropriate that each party obtain independent legal advice before concluding an agreement.
4. Safety and appropriateness of mediation. A mediator shall tend to the safety and psychological well-being of the parties and those affected by agreements the parties may reach. A mediator shall suspend or terminate the mediation process when the mediator reasonably believes that a participant is unsafe or unable to effectively participate in the mediation or for other compelling reasons.

- a. A mediator should make a reasonable effort to screen for and continuously assess the existence of danger, intimidation, or coercion throughout the mediation process. Reasonable efforts may include meeting separately with the parties and administering the Michigan Domestic Violence Screening Protocol.
- b. If a mediator is made aware through screening or otherwise of abuse or neglect, intimidation, coercion, or violence among the participants or affected parties, the mediator shall take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.
- c. If a mediator believes that a mediation is being used to further illegal or criminal conduct, a mediator should take appropriate steps including, if necessary, postponing, withdrawing from, or terminating the mediation.
- d. If the parties are about to enter into an agreement that a mediator reasonably believes to be unconscionable, a mediator may postpone, withdraw from, or terminate the mediation.
- e. If the mediator does suspend or terminate the mediation, the mediator should take all reasonable steps to minimize prejudice or inconvenience to the parties which may result.

Alternative 1

- B. Other professional roles: A mediator should not act in the role of any other profession while mediating. Acting in the role of another profession before or after mediating may also pose a conflict of interest or affect the impartiality of a mediator.
 1. Changing roles. A mediator shall not undertake an additional dispute resolution role in the same matter without consent of the parties, and only if the mediator can do so consistent with these Standards. 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.
 2. Advice and information. A mediator shall not provide information or advice such as legal or financial information or advice without the express agreement of the parties, and shall inform the participants that they may obtain independent advice from other professionals such as attorneys, accountants, etc. A mediator may provide such information or advice only if the mediator is qualified by training or experience to provide it, and only if the mediator can do so consistent with these Standards.

3. 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.

Alternative 2

- B. Role of the mediator: A mediator shall facilitate communication between the parties, assist in identifying issues, and help explore solutions to promote a mutually acceptable settlement. A mediator shall remain neutral as to the outcome of and existence of a settlement.
1. A mediator should inform the participants that they may obtain independent advice from other professionals.
 2. A mediator should recommend, where appropriate, that parties consider other dispute resolution processes provided by other professionals.
 3. At the request of the parties, a mediator may provide information that the mediator is qualified by training or experience to provide if the mediator can do so consistent with these Standards.
 4. At the request of the parties, a mediator may provide an evaluation of the case or propose a recommendation for settlement. A mediator who changes to this new role shall discontinue serving as a mediator in the same dispute. A mediator who undertakes such new role assumes different duties and responsibilities and may be governed by other standards of conduct.
 5. A mediator should not simultaneously act within a dispute in the role of any other profession while mediating the dispute.
 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.

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. A mediator should not advertise statistical settlement data or settlement rates.

2. A mediator should not claim to meet the mediator qualifications of a governmental entity or private organization unless 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 use the names of persons served, without their permission, in promotional materials or through other forms of communication.

Standard VIII. Fees and Other Charges

- A. A mediator shall provide each party or each party's representative accurate 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 should provide fee information as early as possible in the mediation process.
 3. A mediator's fee arrangement should be in writing unless the parties request otherwise.
 4. A mediator may require advance payment of a fee, but is obliged to return any unearned portion at the conclusion of the mediation process.
- B. A mediator shall not charge or accept fees in a manner that impairs or may appear to impair a mediator's impartiality.
1. A mediator should not enter into a fee agreement which is contingent upon the result of the mediation or amount of the settlement.
 2. While a mediator may accept unequal fee payments from the parties, a mediator should not use fee arrangements that adversely impact the mediator's ability to conduct a mediation in an impartial manner.
 3. A mediator should not accept payment for a referral.

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.
 - 4. Assisting newer mediators through training, mentoring and networking.
 - 5. Participating in programs of self assessment and peer consultation.

- 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.

Facilitator and Reporter:

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