

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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Proposal for Revising Michigan’s Standards of Conduct for Mediators

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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Appendix 1

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Standards of Conduct for Mediators

(1) **Introduction.** These standards of conduct apply to all persons who act as a mediator pursuant to the dispute resolution programs of the court. They are designed to promote honesty, integrity, and impartiality in providing court-connected dispute resolution services. These standards shall be made a part of all training and educational requirements for court-connected programs, shall be provided to all mediators involved in court-connected programs and shall be available to the public.

(2) **Self-Determination.** A mediator shall recognize that mediation is based upon the principle of self-determination by the parties. This principle requires that the mediation process rely upon the ability of the parties to reach a voluntary, uncoerced agreement.

(3) **Impartiality.** A mediator shall conduct the mediation in an impartial manner. The concept of mediator impartiality is central to the mediation process. A mediator shall mediate only those matters in which it is possible to remain impartial and even-handed. If at any time the mediator is unable to conduct the process in an impartial manner, the mediator is obligated to withdraw.

(4) **Conflict of Interest.**

(a) 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. A mediator shall promptly disclose all actual and potential conflicts of interest reasonably known to the mediator. 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 unless the conflict of interest casts serious doubts on the integrity of the process, in which case the mediator shall decline to proceed.

(b) The need to protect against conflicts of interest also governs conduct that occurs during and after the mediation. A mediator must avoid the appearance of conflict of interest both during and after the mediation. Without the consent of all parties, a mediator shall not subsequently establish a professional relationship with one of the parties in a related matter, or in an unrelated matter under circumstances that would raise legitimate questions about the integrity of the mediation process. A mediator shall not establish a personal or intimate relationship with any of the parties that would raise legitimate questions about the integrity of the mediation process.

(5) **Confidentiality.** Statements made during the mediation, including statements made in written submissions, may not be used in any other proceedings, 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).

(6) Competence. A mediator shall mediate only when the mediator has the necessary qualifications to satisfy the reasonable expectations of the parties. Mediators assigned by the court are required to have the training and experience specified by court rule.

(7) Quality of the Process. A mediator shall conduct the mediation fairly and diligently. A mediator shall work to ensure a quality process and to encourage mutual respect among the parties. A quality process requires a commitment by the mediator to diligence and procedural fairness. There should be adequate opportunity for each party in the mediation to participate in the discussions. The parties decide when and under what conditions they will reach an agreement or terminate a mediation.

(8) Advertising and Solicitation. A mediator shall be truthful in advertising and solicitation for mediation. Advertising or any other communication with the public concerning services offered or regarding the education training and expertise of the mediator shall be truthful. Mediators shall refrain from promises and guarantees of results.

(9) Fees. A mediator shall fully disclose and explain the basis of compensation, fees, and charges to the parties. The parties should be provided sufficient information about fees at the outset of a mediation to determine if they wish to retain the services of a mediator or to object to mediation. Any fees charged by a mediator shall be reasonable, considering, among other things, the mediation services, the type and complexity of the matter, the expertise of the mediator, the time required, and the rates customary to the community.

(10) Obligations to the Mediation Process. Mediators have a duty to improve the practice of mediation by helping educate the public about mediation, making mediation accessible to those who would like to use it, correcting abuses, and improving their professional skills and abilities.

[Effective January 4, 2001]

2001 Staff Comment

These Standards of Conduct were proposed by the Michigan Supreme Court Dispute Resolution Task Force in its January, 2000 Recommendations to the Michigan Supreme Court. The Standards derive principally from the Model Standards of Conduct for Mediators developed by delegates of the American Bar Association, Society of Professionals in Dispute Resolution, and American Arbitration Association.

**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 Resolution¹. A joint committee consisting of representatives from the same successor organizations revised the Model Standards in 2005.² Both the original 1994 version and the 2005 revision have been approved by each participating organization.³

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.

¹ 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.

² 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.

³ 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.
 - 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.
- 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.
 - 2. A mediator should only accept cases when the mediator can satisfy the reasonable expectation of the parties concerning the timing of a mediation.
 - 3. 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.
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 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.

Appendix 4

***Model Standards of Practice for
Family and Divorce Mediation***

Developed by

The Symposium on Standards of Practice

August 2000

Reporter's Foreword

The *Model Standards of Practice for Family and Divorce Mediation* (“*Model Standards*”) are the family mediation community’s definition of the role of mediation in the dispute resolution system in the twenty-first century. They are the latest milestone in a nearly twenty year old effort by the family mediation community to create standards of practice that will increase public confidence in an evolving profession and provide guidance for its practitioners. The *Model Standards* are the product of an effort by prominent mediation-interested organizations and individuals to create a unified set of standards that will replace existing ones. They draw on existing codes of conduct for mediators and take into account issues and problems that have been identified in divorce and family mediation practice.

Between 1982 and 1984 AFCC convened three national symposia on divorce mediation standards. Over forty individuals from thirty organizations attended to explore issues of certification, licensure and standards of practice. Drafts were distributed to over one hundred thirty individuals and organizations for comment and review. The result of the efforts was the 1984 *Model Standards of Practice for Family and Divorce Mediation* (“*1984 Model Standards*”) which have served as a resource document for state and national mediation organizations.

In tandem with the process convened by AFCC, the American Bar Association’s Family Law Section drafted *Standards of Practice for Lawyer Mediators in Family Law Disputes* (1984) (“*1984 ABA Standards*”). The *1984 ABA Standards* were primarily developed for lawyers who wished to be mediators, a role at that time some thought inconsistent with governing standards of professional responsibility for lawyers. The *1984 ABA Standards* helped define how lawyers could serve as family mediators and still stay within the ethical guidelines of the profession. Several members of the Committee who worked on the *1984 Model Standards*, particularly Jay Folberg and Tom Bishop, participated in the drafting of the *1984 ABA Standards*. As a result the *1984 ABA Standards* were basically compatible with the *1984 Model Standards*.

Following promulgation of the *1984 Model Standards* and *1984 ABA Standards* interest in mediation in all fields, and family mediation in particular, burgeoned. Interested organizations promulgated their own standards of practice. The Academy of Family Mediators, for example, promulgated its own standards of conduct based on the *1984 Model Standards*. Several states and courts have also set standards. *See, e.g.*, Florida Rules for Certified and Court-Appointed Mediators (October, 1995); Iowa Supreme Court, Rules Governing Standards of Practice for Lawyer-Mediators in Family Disputes (1986).

Other efforts were made by concerned organizations to establish standards of practice for mediation generally. For example, a joint Task Force of the American Arbitration Association, American Bar Association and the Society of Professionals in Dispute Resolution (SPIDR) published *Model Standards of Conduct for Mediators* in 1995.

In 1996, the Family Law Section of the American Bar Association came to the conclusion that interest in and knowledge about family mediation had expanded dramatically since the *1984 ABA Standards* were promulgated and a fresh look at that effort was required.* It

* The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as

created a Task Force on Standards of Practice for Divorce Mediation (later renamed the Committee on Mediation) (“ABA Committee”) to review the *1984 ABA Standards* and make recommendations for changes and amendments. The ABA Committee was chaired by Nancy Palmer and Phyllis Campion. Professor Andrew Schepard of Hofstra Law School was asked to serve as the Committee’s Reporter. The project was conceived of as a collaboration with other interested groups; membership of the ABA Committee included non-lawyer mediators and liaisons from AFCC, AFM and SPIDR.

After intensive review and study, the ABA Committee concluded that while the *1984 ABA Standards* were a major step forward in the development of divorce and family mediation they were in need of significant revision.

First, the *1984 ABA Standards* did not address many critical issues in mediation practice that have been identified since they were initially promulgated. They did not deal with domestic violence and child abuse. The *1984 ABA Standards* also did not address the mediator’s role in helping parents define the best interests of their children in their post-divorce parenting arrangements. They made no mention of the need for special expertise and training in mediation or family violence.

Second, the *1984 ABA Standards* were inconsistent with other guidelines for the conduct of mediation subsequently promulgated. The ABA Committee believed that uniformity of mediation standards among interested groups is highly desirable to provide clear guidance for family mediators and for the public. Uniformity and clarity could not be provided within the framework of the *1984 ABA Standards*. The ABA Committee therefore decided to replace the *1984 ABA Standards* with a new document.

The ABA Committee, including representatives from AFCC, AFM and SPIDR, therefore, created a new draft of standards of practice for family mediation specially applicable to lawyers who sought to involve themselves in that process. The Committee set several goals for the revised standards. First, the ABA Committee sought to insure that its revised standards were state of the art, addressing important developments in family mediation practice since the adoption of the *1984 ABA Standards* and *1984 Model Standards*. Second, the ABA Committee sought to insure that its recommended standards were consistent, as far as is possible, with other standards of practice for divorce and family mediation.

To meet these goals, the ABA Committee examined all available standards of practice, conducted research, and consulted with a number of experts on family and divorce mediation. It particularly focused on consultations with experts in domestic violence and child abuse about the appropriate role for mediation when family situations involved violence or the allegations thereof.

The Council of the ABA’s Family Law Section reviewed the ABA Committee’s first draft effort in November of 1997. It concluded that other interested mediation organizations should be included in the process of drafting revised standards of practice for family mediation.

representing the policy of the American Bar Association.

Other mediation organizations also recognized that their current standards of practice for family mediation also needed review in light of developments in mediation practice since they were promulgated. In 1998, AFCC offered to re-convene the Model Standards Symposium using the draft Standards of Practice created by the ABA Committee as a beginning point of discussion. The Family Law Section of the American Bar Association and the National Council of Dispute Resolution Organizations (an umbrella organization which includes the Academy of Family Mediators, the American Bar Association Section of Dispute Resolution, AFCC, Conflict Resolution Education Network, the National Association for Community Mediation, the National Conference on Peacemaking and Conflict Resolution, and the Society of Professionals in Dispute Resolution) joined AFCC in co-convening the Model Standards Symposium.

In October, 1998 the Model Standards Symposium convened in Orlando to review the draft standards created by the ABA Committee. Representatives of over twenty family mediation organizations reviewed the ABA draft line by line during a full day session facilitated by Tom Fee. A first Draft of revised *Model Standards* for all family mediators regardless of profession of origin resulted.

The Symposium met again on February 26, 2000 in New Orleans. At that time it reviewed proposals for changes in the *Draft Standards* which were published in the January 2000 issue of the *Family and Conciliation Courts Review* and posted on the Web sites of AFCC, the ABA Family Law Section, and the ABA Dispute Resolution Section. In addition, before the February 2000 Meeting, the *Draft Standards* were mailed to over ninety (90) local and national mediation interested groups. All of these publications included requests for comments with proposals for specific language changes in the *Draft Standards*. In response, the Symposium received comments and over eighty (80) proposals for changes in the *Draft Model Standards* from numerous groups and individuals that make up the diverse membership of the family mediation community.

All of the comments and suggestions for change were made in a constructive spirit. Commentators generally supported the effort to develop *Model Standards* and expressed appreciation to the Symposium for its work.

Attendees at the February 2000 Meeting included approximately twenty-five family mediators from across the nation with years of experience in the field. Participants included leaders in national or local family mediation or dispute resolution organizations. In addition, the American Bar Association's Commission on Domestic Violence participated as an expert consultant at the February meeting.

Tom Fee again served as the facilitator for the February 2000 Meeting. The structure of the Meeting was guided by a steering committee comprised of representatives of the convening organizations. The Symposium participants were divided into three work groups, each assigned to analyze and comment on a specific number of proposed Standards. The work groups each appointed a reporter, and the whole group reconvened towards the end of the day to process the changes the work groups recommended and to see how they related to the *Draft Standards* as a whole.

Discussion was again lively and well-informed; in effect, the February 2000 Meeting was a continuation of a seminar of accomplished professionals and organizational leaders on the future of family and divorce mediation. Mediators of different professions of origin, background and orientation engaged in a discussion which bridged gaps between different perspectives. Great progress was made in developing a final set of *Model Standards* that each participating organization would be encouraged to discuss and adopt for its own purposes.

The Symposium did not finish its work at the February 2000 Meeting, a not surprising outcome given the complexity and richness of the discussion. The participants agreed that the Reporter for the Symposium, in conjunction with the Reporters for each workgroup, would collate the changes in the *Draft Standards* that had been agreed to and identify the unresolved issues. A revised Draft of the *Standards* in that format was sent to over ninety (90) interested organizations.

The Symposium completed its work at a subsequent meeting in Chicago on August 5, 2000 which followed the same organizational model as the February 2000 meeting. Tom Fee again facilitated. Eighteen (18) experienced family mediators from around the nation again participated in lively full day discussions which reviewed the Draft *Model Standards* line by line.

The *Model Standards* that follow are thus the result of extensive and thoughtful deliberation by the family mediation community with wide input from a variety of voices. Nonetheless, they should not be thought of as a final product but more like a panoramic snapshot of what is important to the family mediation community at the beginning of the new Millennium. The Symposium hopes the *Model Standards* will provide a framework for a continuous dialogue to define and refine our emerging profession. The Symposium organizers hope that the family mediation organizations, the bench and the bar and the public will use the *Model Standards* as a starting point for discussion and debate. That continuing process should result in identification of new areas of concern that additional Standards should address and proposals for revision of existing *Standards*.

On a personal level, I have never worked with better people than those who made up the Symposium. Special thanks go to the wonderful people who made this task a continuing seminar in the underlying values of family mediation and how to reach consensus among thoughtful, decent citizens of their communities. The participants in the Symposium demonstrated a cooperative, inquisitive spirit that made the Reporter's work a pleasure.

*Professor Andrew Shepard
Hofstra University School of Law
Hempstead, New York
August, 2000*

The Symposium on Model Standards of Practice for Family and Divorce Mediation

Note: Organizational affiliations are listed for identification only. Symposium members who represented organizations listed below functioned as liaisons. Their participation does not indicate organizational endorsement of the *Model Standards*..

Convening Organizations:

The Association of Family and Conciliation Courts
The Family Law Section of the American Bar Association
National Council of Dispute Resolution Organizations (NCDRO)
which includes:
The Academy of Family Mediators
The American Bar Association Section of Dispute Resolution
The Association of Family and Conciliation Courts
Conflict Resolution Education Network
The National Association for Community Mediation
The National Conference on Peacemaking and Conflict Resolution
The Society of Professionals in Dispute Resolution

Model Standards Steering Committee

Phil Bushard, Association of Family and Conciliation Courts (1999-2000)
Christie Coates, Association of Family and Conciliation Courts (1998-2000)
Tom Fee, Facilitator, The Agreement Zone (1998-2000)
Jack Hanna, NCDRO Secretariat and American Bar Association Dispute Resolution Section (1999-2000)
Ann Milne, Association of Family and Conciliation Courts (1998-2000)
Tim Walker, American Bar Association Family Law Section (1998-2000)
Sally Pope, NCDRO Secretariat and Academy of Family Mediators (1998-1999)
Eileen Pruett, Association of Family and Conciliation Courts (1999-2000) and Supreme Court of Ohio, Office of Dispute Resolution Programs
Andrew Schepard, Reporter, Hofstra University School of Law (1998-2000)

Model Standards Symposium Participants

Organization

Academy of Family Mediators

Delegate

Sue Costello Lowe (New Orleans)
Sally Pope (Orlando)
Arnold Shienvold (New Orleans)
Hon. William Thomas (Chicago)

American Academy of Matrimonial Lawyers

Meredith Cohen (Orlando)
Joan Patsy Ostroy (New Orleans, Chicago)

American Bar Association Section on
Family Law

American Bar Association Section on

Dispute Resolution

Timothy Walker (New Orleans)
Benjamin Mackoff (Chicago)

Nancy Palmer (Orlando, New Orleans)
Barbara Stark (Orlando)

American Bar Association Commission on
Domestic Violence

Ann Barker (Orlando, New Orleans)

Association of Family and Conciliation
Courts

Phil Bushard (Orlando, New Orleans)
Christie Coates (Orlando, Chicago)
Ann Milne (Orlando, New Orleans, Chicago)
Eileen Pruett (Orlando, New Orleans,
Chicago)
Jan Shaw (Orlando)
Rosemary Vasquez (Orlando)

California Administrative Office of the
Court

Mimi Lyster (Orlando, New Orleans)

Colorado Council of Mediators

Silke Hansen (New Orleans)

Connecticut Council of Mediators

Frances Calafiore (Chicago)
Robert Horwitz (New Orleans)

Delaware Federation for Dispute Resolution

Jolly Clarkson-Shorter (Orlando)

Family Mediation Council of Louisiana

Susan Norwood (New Orleans)

Family and Divorce Mediation Council of
New York

Eli Uncyk (New Orleans)

Florida Association of Professional Family
Mediators

Nancy Blanton (New Orleans)
Richard Doelker (New Orleans)

Florida Dispute Resolution Center

Sharon Press (Orlando, New Orleans,
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Andrew Schepard, Reporter (Orlando, New
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Indiana Association of Mediators, Inc.

Patrick Brown (Orlando)
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Mediation Association of Northwest Ohio

Richard Altman (Orlando, New Orleans,
Chicago)

Mediation Association of Tennessee	Jan Walden (Orlando)
Mediation Council of Illinois	Jerald Kessler (Orlando, Chicago)
Montgomery County Mediation Center	Winnie Backlund (Orlando, Chicago)
National Association for Community Mediation	Carolee Robertson (Chicago)
National Conference on Peacemaking and Conflict Resolution	S. Y. Bowland (New Orleans, Chicago)
New York State Council on Divorce Mediation	Steven Abel (Orlando) Glenn Dornfeld (New Orleans)
New York State Dispute Resolution Association	Rosalyn Magidson (New Orleans, Chicago)
Pennsylvania Council of Mediators	Winnie Backlund (Orlando, Chicago) Grace Byler (New Orleans, Chicago)
Tennessee Superior Court, ADR Commission	Ann Barker (Orlando, New Orleans)
State Bar of Wisconsin, Alternative Dispute Resolution Section	Larry Kahn (Chicago)
Society for Professionals in Dispute Resolution	Sharon Press (Orlando, New Orleans, Chicago)
Supreme Court of Ohio Dispute Resolution Program	C. Eileen Pruett (Orlando, New Orleans, Chicago)
The Agreement Zone	Tom Fee, Facilitator (Orlando, New Orleans, Chicago)
Wisconsin Association of Mediators	Larry Kahn (Chicago)

Additional Organizations Providing Written Commentary

Association of Broward County Mediators, by Amy Kirschner Hyman
Mediation Services and ADR Referrals, Seventh Judicial Circuit of Maryland, by Ramona Buck
Office of Dispute Resolution, Colorado Judicial Branch, by Robert Smith
Family and Divorce Mediation Council of Greater New York, by June Jacobson

Model Standards of Practice for Family and Divorce Mediation

Overview and Definitions

Family and divorce mediation (“family mediation” or “mediation”) is a process in which a mediator, an impartial third party, facilitates the resolution of family disputes by promoting the participants’ voluntary agreement. The family mediator assists communication, encourages understanding and focuses the participants on their individual and common interests. The family mediator works with the participants to explore options, make decisions and reach their own agreements.

Family mediation is not a substitute for the need for family members to obtain independent legal advice or counseling or therapy. Nor is it appropriate for all families. However, experience has established that family mediation is a valuable option for many families because it can:

- increase the self-determination of participants and their ability to communicate;
- promote the best interests of children; and
- reduce the economic and emotional costs associated with the resolution of family disputes.

Effective mediation requires that the family mediator be qualified by training, experience and temperament; that the mediator be impartial; that the participants reach their decisions voluntarily; that their decisions be based on sufficient factual data; that the mediator be aware of the impact of culture and diversity; and that the best interests of children be taken into account. Further, the mediator should also be prepared to identify families whose history includes domestic abuse or child abuse.

These *Model Standards of Practice for Family and Divorce Mediation* (“*Model Standards*”) aim to perform three major functions:

1. to serve as a guide for the conduct of family mediators;
2. to inform the mediating participants of what they can expect; and
3. to promote public confidence in mediation as a process for resolving family disputes.

The *Model Standards* are aspirational in character. They describe good practices for family mediators. They are not intended to create legal rules or standards of liability.

The *Model Standards* include different levels of guidance:

- Use of the term “may” in a *Standard* is the lowest strength of guidance and indicates a practice that the family mediator should consider adopting but which can be deviated from in the exercise of good professional judgment.
- Most of the *Standards* employ the term “should” which indicates that the practice described in the *Standard* is highly desirable and should be departed from only with very strong reason.
- The rarer use of the term “shall” in a *Standard* is a higher level of guidance to the family mediator, indicating that the mediator should not have discretion to depart from the practice described.

Standard I

A family mediator shall recognize that mediation is based on the principle of self-determination by the participants.

- A. Self-determination is the fundamental principle of family mediation. The mediation process relies upon the ability of participants to make their own voluntary and informed decisions.
- B. The primary role of a family mediator is to assist the participants to gain a better understanding of their own needs and interests and the needs and interests of others and to facilitate agreement among the participants.
- C. A family mediator should inform the participants that they may seek information and advice from a variety of sources during the mediation process.
- D. A family mediator shall inform the participants that they may withdraw from family mediation at any time and are not required to reach an agreement in mediation.
- E. The family mediator’s commitment shall be to the participants and the process. Pressure from outside of the mediation process shall never influence the mediator to coerce participants to settle.

Standard II

A family mediator shall be qualified by education and training to undertake the mediation.

- A. To perform the family mediator’s role, a mediator should:
 1. have knowledge of family law;
 2. have knowledge of and training in the impact of family conflict on parents, children and other participants, including knowledge of child development,

- domestic abuse and child abuse and neglect;
 - 3. have education and training specific to the process of mediation;
 - 4. be able to recognize the impact of culture and diversity.
- B. Family mediators should provide information to the participants about the mediator's relevant training, education and expertise.

Standard III

A family mediator shall facilitate the participants' understanding of what mediation is and assess their capacity to mediate before the participants reach an agreement to mediate.

- A. Before family mediation begins a mediator should provide the participants with an overview of the process and its purposes, including:
- 1. informing the participants that reaching an agreement in family mediation is consensual in nature, that a mediator is an impartial facilitator, and that a mediator may not impose or force any settlement on the parties;
 - 2. distinguishing family mediation from other processes designed to address family issues and disputes;
 - 3. informing the participants that any agreements reached will be reviewed by the court when court approval is required;
 - 4. informing the participants that they may obtain independent advice from attorneys, counsel, advocates, accountants, therapists or other professionals during the mediation process;
 - 5. advising the participants, in appropriate cases, that they can seek the advice of religious figures, elders or other significant persons in their community whose opinions they value;
 - 6. discussing, if applicable, the issue of separate sessions with the participants, a description of the circumstances in which the mediator may meet alone with any of the participants, or with any third party and the conditions of confidentiality concerning these separate sessions;
 - 7. informing the participants that the presence or absence of other persons at a mediation, including attorneys, counselors or advocates, depends on the agreement of the participants and the mediator, unless a statute or regulation otherwise requires or the mediator believes that the presence of another person is required or may be beneficial because of a history or threat of violence or other serious coercive activity by a participant.

8. describing the obligations of the mediator to maintain the confidentiality of the mediation process and its results as well as any exceptions to confidentiality;
 9. advising the participants of the circumstances under which the mediator may suspend or terminate the mediation process and that a participant has a right to suspend or terminate mediation at any time.
- B. The participants should sign a written agreement to mediate their dispute and the terms and conditions thereof within a reasonable time after first consulting the family mediator.
 - C. The family mediator should be alert to the capacity and willingness of the participants to mediate before proceeding with the mediation and throughout the process. A mediator should not agree to conduct the mediation if the mediator reasonably believes one or more of the participants is unable or unwilling to participate.
 - D. Family mediators should not accept a dispute for mediation if they cannot satisfy the expectations of the participants concerning the timing of the process.

Standard IV

A family mediator shall conduct the mediation process in an impartial manner. A family mediator shall disclose all actual and potential grounds of bias and conflicts of interest reasonably known to the mediator. The participants shall be free to retain the mediator by an informed, written waiver of the conflict of interest. However, if a bias or conflict of interest clearly impairs a mediator's impartiality, the mediator shall withdraw regardless of the express agreement of the participants.

- A. Impartiality means freedom from favoritism or bias in word, action or appearance, and includes a commitment to assist all participants as opposed to any one individual.
- B. Conflict of interest means any relationship between the mediator, any participant or the subject matter of the dispute, that compromises or appears to compromise the mediator's impartiality.
- C. A family mediator should not accept a dispute for mediation if the family mediator cannot be impartial.
- D. A family mediator should identify and disclose potential grounds of bias or conflict of interest upon which a mediator's impartiality might reasonably be questioned. Such disclosure should be made prior to the start of a mediation and in time to allow the participants to select an alternate mediator.
- E. A family mediator should resolve all doubts in favor of disclosure. All disclosures should be made as soon as practical after the mediator becomes aware of the bias or potential conflict of interest. The duty to disclose is a continuing duty.

- F. A family mediator should guard against bias or partiality based on the participants' personal characteristics, background or performance at the mediation.
- G. A family mediator should avoid conflicts of interest in recommending the services of other professionals.
- H. A family mediator shall not use information about participants obtained in a mediation for personal gain or advantage
- I. A family mediator should withdraw pursuant to *Standard IX* if the mediator believes the mediator's impartiality has been compromised or a conflict of interest has been identified and has not been waived by the participants.

Standard V

A family mediator shall fully disclose and explain the basis of any compensation, fees and charges to the participants.

- A. The participants should be provided with sufficient information about fees at the outset of mediation to determine if they wish to retain the services of the mediator.
- B. The participants' written agreement to mediate their dispute should include a description of their fee arrangement with the mediator.
- C. A mediator should not enter into a fee agreement which is contingent upon the results of the mediation or the amount of the settlement.
- D. A mediator should not accept a fee for referral of a matter to another mediator or to any other person.
- E. Upon termination of mediation a mediator should return any unearned fee to the participants.

Standard VI

A family mediator shall structure the mediation process so that the participants make decisions based on sufficient information and knowledge.

- A. The mediator should facilitate full and accurate disclosure and the acquisition and development of information during mediation so that the participants can make informed decisions. This may be accomplished by encouraging participants to consult appropriate experts.
- B. Consistent with standards of impartiality and preserving participant self-determination, a mediator may provide the participants with information that the mediator is qualified by training or experience to provide. The mediator shall not provide therapy or legal advice.

- C. The mediator should recommend that the participants obtain independent legal representation before concluding an agreement.
- D. If the participants so desire, the mediator should allow attorneys, counsel or advocates for the participants to be present at the mediation sessions.
- E. With the agreement of the participants, the mediator may document the participants' resolution of their dispute. The mediator should inform the participants that any agreement should be reviewed by an independent attorney before it is signed.

Standard VII

A family mediator shall maintain the confidentiality of all information acquired in the mediation process, unless the mediator is permitted or required to reveal the information by law or agreement of the participants.

- A. The mediator should discuss the participants' expectations of confidentiality with them prior to undertaking the mediation. The written agreement to mediate should include provisions concerning confidentiality.
- B. Prior to undertaking the mediation the mediator should inform the participants of the limitations of confidentiality such as statutory, judicially or ethically mandated reporting.
- C. The mediator shall disclose a participant's threat of suicide or violence against any person to the threatened person and the appropriate authorities if the mediator believes such threat is likely to be acted upon as permitted by law.
- D. If the mediator holds private sessions with a participant, the obligations of confidentiality concerning those sessions should be discussed and agreed upon prior to the sessions.
- E. If subpoenaed or otherwise noticed to testify or to produce documents the mediator should inform the participants immediately. The mediator should not testify or provide documents in response to a subpoena without an order of the court if the mediator reasonably believes doing so would violate an obligation of confidentiality to the participants.

Standard VIII

A family mediator shall assist participants in determining how to promote the best interests of children.

- A. The mediator should encourage the participants to explore the range of options available for separation or post divorce parenting arrangements and their respective costs and benefits. Referral to a specialist in child development may be appropriate for these purposes. The topics for discussion may include, among others:
 1. information about community resources and programs that can help the participants

and their children cope with the consequences of family reorganization and family violence;

2. problems that continuing conflict creates for children's development and what steps might be taken to ameliorate the effects of conflict on the children;
 3. development of a parenting plan that covers the children's physical residence and decision-making responsibilities for the children, with appropriate levels of detail as agreed to by the participants;
 4. the possible need to revise parenting plans as the developmental needs of the children evolve over time; and
 5. encouragement to the participants to develop appropriate dispute resolution mechanisms to facilitate future revisions of the parenting plan.
- B. The mediator should be sensitive to the impact of culture and religion on parenting philosophy and other decisions.
- C. The mediator shall inform any court-appointed representative for the children of the mediation. If a representative for the children participates, the mediator should, at the outset, discuss the effect of that participation on the mediation process and the confidentiality of the mediation with the participants. Whether the representative of the children participates or not, the mediator shall provide the representative with the resulting agreements insofar as they relate to the children.
- D. Except in extraordinary circumstances, the children should not participate in the mediation process without the consent of both parents and the children's court-appointed representative.
- E. Prior to including the children in the mediation process, the mediator should consult with the parents and the children's court-appointed representative about whether the children should participate in the mediation process and the form of that participation.
- F. The mediator should inform all concerned about the available options for the children's participation (which may include personal participation, an interview with a mental health professional, or the mediator reporting to the parents, or a videotape statement) and discuss the costs and benefits of each with the participants.

Standard IX

A family mediator shall recognize a family situation involving child abuse or neglect and take appropriate steps to shape the mediation process accordingly.

- A. As used in these Standards, child abuse or neglect is defined by applicable state law.
- B. A mediator shall not undertake a mediation in which the family situation has been

assessed to involve child abuse or neglect without appropriate and adequate training.

- C. If the mediator has reasonable grounds to believe that a child of the participants is abused or neglected within the meaning of the jurisdiction's child abuse and neglect laws, the mediator shall comply with applicable child protection laws.
 - 1. The mediator should encourage the participants to explore appropriate services for the family.
 - 2. The mediator should consider the appropriateness of suspending or terminating the mediation process in light of the allegations.

Standard X

A family mediator shall recognize a family situation involving domestic abuse and take appropriate steps to shape the mediation process accordingly..

- A. As used in these Standards, domestic abuse includes domestic violence as defined by applicable state law and issues of control and intimidation.
- B. A mediator shall not undertake a mediation in which the family situation has been assessed to involve domestic abuse without appropriate and adequate training.
- C. Some cases are not suitable for mediation because of safety, control or intimidation issues. A mediator should make a reasonable effort to screen for the existence of domestic abuse prior to entering into an agreement to mediate. The mediator should continue to assess for domestic abuse throughout the mediation process.
- D. If domestic abuse appears to be present the mediator shall consider taking measures to insure the safety of participants and the mediator including, among others:
 - 1. establishing appropriate security arrangements;
 - 2. holding separate sessions with the participants even without the agreement of all participants;
 - 3. allowing a friend, representative, advocate, counsel or attorney to attend the mediation sessions;
 - 4. encouraging the participants to be represented by an attorney, counsel or an advocate throughout the mediation process;
 - 5. referring the participants to appropriate community resources;
 - 6. suspending or terminating the mediation sessions, with appropriate steps to protect the safety of the participants.

- E. The mediator should facilitate the participants' formulation of parenting plans that protect the physical safety and psychological well-being of themselves and their children.

Standard XI

A family mediator shall suspend or terminate the mediation process when the mediator reasonably believes that a participant is unable to effectively participate or for other compelling reasons.

- A. Circumstances under which a mediator should consider suspending or terminating the mediation, may include, among others:
1. the safety of a participant or well-being of a child is threatened;
 2. a participant has or is threatening to abduct a child;
 3. a participant is unable to participate due to the influence of drugs, alcohol, or physical or mental condition;
 4. the participants are about to enter into an agreement that the mediator reasonably believes to be unconscionable;
 5. a participant is using the mediation to further illegal conduct;
 6. a participant is using the mediation process to gain an unfair advantage;
 7. if the mediator believes the mediator's impartiality has been compromised in accordance with *Standard IV*.
- B. If the mediator does suspend or terminate the mediation, the mediator should take all reasonable steps to minimize prejudice or inconvenience to the participants which may result.

Standard XII

A family mediator shall be truthful in the advertisement and solicitation for mediation.

- A. Mediators should refrain from promises and guarantees of results. A mediator should not advertise statistical settlement data or settlement rates.
- B. Mediators should accurately represent their qualifications. In an advertisement or other communication, a mediator may make reference to meeting state, national, or private organizational qualifications only if the entity referred to has a procedure for qualifying mediators and the mediator has been duly granted the requisite status.

Standard XIII

A family mediator shall acquire and maintain professional competence in mediation.

- A. Mediators should continuously improve their professional skills and abilities by, among other activities, participating in relevant continuing education programs and should regularly engage in self-assessment.
- B. Mediators should participate in programs of peer consultation and should help train and mentor the work of less experienced mediators.
- C. Mediators should continuously strive to understand the impact of culture and diversity on the mediator's practice.

Appendix:Special Policy Considerations forState Regulation of Family Mediators and Court Affiliated Programs

The *Model Standards* recognize the *National Standards for Court Connected Dispute Resolution Programs* (1992). There are also state and local regulations governing such programs and family mediators. The following principles of organization and practice, however, are especially important for regulation of mediators and court-connected family mediation programs. They are worthy of separate mention.

- A. Individual states or local courts should set standards and qualifications for family mediators including procedures for evaluations and handling grievances against mediators. In developing these standards and qualifications, regulators should consult with appropriate professional groups, including professional associations of family mediators.
- A. When family mediators are appointed by a court or other institution, the appointing agency should make reasonable efforts to insure that each mediator is qualified for the appointment. If a list of family mediators qualified for court appointment exists, the requirements for being included on the list should be made public and available to all interested persons.
- A. Confidentiality should not be construed to limit or prohibit the effective monitoring, research, evaluation or monitoring of mediation programs by responsible individuals or academic institutions provided that no identifying information about any person involved in the mediation is disclosed without their prior written consent. Under appropriate circumstances, researchers may be permitted to obtain access to statistical data and, with the permission of the participants, to individual case files, observations of live mediations, and interviews with participants.