

**NEW YORK STATE UNIFIED COURT SYSTEM  
DIVISION OF PROFESSIONAL AND COURT SERVICES**

**OFFICE OF ADR PROGRAMS**



**STANDARDS OF CONDUCT FOR NEW YORK STATE COMMUNITY  
DISPUTE RESOLUTION CENTER MEDIATORS**

*Revised 2009*

# **STANDARDS OF CONDUCT FOR NEW YORK STATE COMMUNITY DISPUTE RESOLUTION CENTER MEDIATORS**

## **INTRODUCTION**

The New York State Office of Alternative Dispute Resolution Programs has developed these Standards of Conduct (“Standards”) for New York State mediators in community dispute resolution centers<sup>1</sup> located throughout New York State. These Standards have been adapted from The Revised Model Standards of Conduct created by the American Arbitration Association, the American Bar Association (Section of Dispute Resolution) and the Association of Conflict Resolution.<sup>2</sup>

The Standards are intended to serve as a general framework for the practice of mediation and aim to:

- 1.) educate mediators regarding current standards of practice;
- 2.) guide mediators in their practice;
- 3.) promote public confidence in mediation as a dispute resolution process;  
and
- 4.) inform the mediating parties about the process.

The Standards include different levels of guidance<sup>3</sup>:

- ▶ Use of the term “may” is the lowest strength of guidance and indicates a practice that the mediator should consider adopting but which can be deviated from in the exercise of good professional judgment.
- ▶ Use of the term “should” indicates that the practice described in the Standard is strongly suggested and should be departed from only with very strong reason.
- ▶ Use of the term “shall” is the highest level of guidance to the mediator, indicating that the mediator must follow the practice described.

These Standards of Conduct are applicable to those practicing mediators who mediate under the auspices of a New York State Community Resolution Center Program.

The Standards are listed and followed by Comments, where appropriate. The order of the Comments is not intended to reflect any priority in their importance. The Standards are meant to be read and interpreted in their entirety.

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<sup>1</sup>A Community Dispute Resolution Center is a community-based, private, not-for-profit program that contracts with the Chief Administrative Judge of the Unified Court System of the State of New York to provide conciliation, mediation, arbitration, or other types of dispute resolution services.

<sup>2</sup>Joint Committee Draft, January 1, 2004 (approved by the American Bar Association 2005).

<sup>3</sup>This language is adopted in large part from the *Model Standards of Practice for Family and Divorce Mediation*, developed by the Symposium on Standards of Practice (August 2000).

The Standards are to be used as a guide for ethical mediation practice. The Standards are not intended to be used as a substitute for other professional rules, applicable law, court rules, or regulations.

To the extent that a mediator cannot resolve an ethical dilemma after reading these Standards as a whole, or that the mediator finds that a certain Standard may conflict with another Standard contained therein, the mediator is encouraged to address this concern in writing to the Mediator Ethics Advisory Committee of the New York State Office of ADR Programs.<sup>4</sup> The Mediator Ethics Advisory Committee recognizes that a mediator may need to resolve a conflict in a shorter time period than the Committee may have to respond. In such a case, the mediator should exercise good professional judgment for guidance in reaching a resolution of the conflict.<sup>5</sup> Nonetheless, the mediator should consult the Mediator Ethics Advisory Committee.

The Standards are followed by “Committee Notes” that clarify, define, and expand on the statements made in the Standards and Comments, as well as a “Definitions” section and an “Appendix.”

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<sup>4</sup>The Mediator Ethics Advisory Committee (“*Committee*”) serves as an ethics advisory board, to interpret and clarify the Standards as they are raised by practicing CDRCP mediators in conjunction with an ethical dilemma. The committee is appointed and serves under the rules created by the New York State Office of ADR Programs. The Committee will consider any ethical dilemma that a mediator raises in accordance with its rules, requiring that the mediator state the dilemma in writing and send the request to: The Mediator Ethics Advisory Committee, New York State Office of ADR Programs, 25 Beaver Street, Room 859-A, New York, NY, 10004, or by e-mail to: [cdrcp@courts.state.ny.us](mailto:cdrcp@courts.state.ny.us).

<sup>5</sup>This may include looking to other applicable professional standards within the mediation field. See *Committee Notes*.

## STANDARD I. SELF-DETERMINATION

- A. A mediator shall conduct a mediation in a manner that supports the principle of party self-determination as to both process and outcome. Party self-determination means that parties are free to make voluntary and uncoerced procedural and substantive decisions, including whether to make an informed choice to agree or not agree.

### COMMENTS:

1. Parties can exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in the process, and outcomes. The mediator is responsible for supporting party self-determination in each area, tempered by a mediator's duty to conduct a quality mediation process.
2. Although party self-determination is a fundamental principle of mediation practice, a mediator may need to balance party self-determination with a duty to conduct a quality mediation process. When resolving these potentially conflicting duties, a mediator should be cautious of conflict of interest issues and avoid influencing party decisions for reasons such as higher settlement rates, egos, increased fees and outside pressures from individuals or organizations.
3. A mediator cannot personally ensure that each party has made a fully informed choice to reach a particular agreement, but the mediator can make the parties aware that they may consult other professionals to help them make informed choices at any point during the mediation process.<sup>6</sup>
4. Where a power imbalance exists between the parties such that one or both parties cannot exercise self-determination, the mediator should postpone the session, withdraw from the mediation, terminate the mediation, or consult with center staff.<sup>7</sup> (see *Committee Notes*)

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<sup>6</sup>A party is unable to make a fully informed choice where, for example, the party is unable to articulate his or her concerns or lacks substantial information regarding the dispute such that the party is unable to make procedural and substantive decisions or an informed decision to agree or not to agree.

<sup>7</sup>Indicators of a "power imbalance" that may impede a party's ability to make a decision freely and willingly include where one party threatens, intimidates, or otherwise coerces the other party into participating in or reaching a desired result in the mediation.

## STANDARD II: IMPARTIALITY

- A. A mediator shall conduct a mediation in an impartial manner and shall avoid conduct that gives the appearance of partiality toward or prejudice against a party. Impartiality means freedom from favoritism or prejudice in word, action or appearance.
- B. A mediator shall accept for mediation only those matters in which the mediator can remain impartial.
- C. If at any time a mediator is unable to conduct the process in an impartial manner, the mediator shall withdraw.
- D. In any mediation, a mediator shall neither give nor accept a gift, favor, loan or other item of value that would raise a question as to the mediator's actual or perceived impartiality.

### COMMENTS:

- 1. A mediator should not act with partiality based on any participant's race, ethnicity, sex, religion, national origin, or sexual orientation or to any other factors that may create bias on the mediator's part.(see *Committee Notes*)
- 2. During the mediation, a mediator shall maintain impartiality even while raising questions regarding the reality, fairness, equity, durability and feasibility of proposed options for resolution. In the event circumstances arise during a mediation that would reasonably be construed to impair or compromise a mediator's impartiality, the mediator is obligated to withdraw.<sup>8</sup>
- 3. The mediator's commitment is to remain impartial towards the parties and their choices in the process, in both joint and private sessions with the parties.<sup>9</sup>

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<sup>8</sup>FLA Rule 10.330, *Committee Notes*, Florida Rules for Certified and Court Appointed Mediators (2000 Revision).

<sup>9</sup>A party may request, or a mediator may offer to the parties as an option, the opportunity to meet individually with the mediator. This private session is often referred to as a "separate session" or "caucus". During such separate sessions between a party and the mediator, the mediator continues to be bound by the Standard of Impartiality and the Standard of Confidentiality (Standard V.).

### **STANDARD III. CONFLICTS OF INTEREST**

- A.** A mediator shall avoid the appearance of a conflict of interest before, during and after a mediation either by disclosing the conflict or withdrawing from the process.
- B.** Before accepting a mediation, 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. Thereafter, and as soon as practical, a mediator shall disclose 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 ability to fairly discharge his or her responsibilities. If a mediator learns any fact described above after accepting a mediation, she or he shall disclose it to the parties as soon as is practical. If all parties agree to retain the mediator after disclosure, the mediator may proceed or continue with the mediation. However, if a conflict of interest casts serious doubt on the integrity of the process, the mediator shall withdraw or decline to proceed regardless of the express agreement of the parties.
- C.** During a mediation, a mediator shall not solicit or otherwise attempt to procure any future professional services, including future mediations, beyond the sessions necessary, to obtain an outcome.
- D.** Subsequent to mediation, a mediator shall not establish another relationship with one of the parties in any matter that would raise questions about the integrity of the mediation process.

### **COMMENTS:**

- 1.** The mediator's duty to make a reasonable inquiry may be shaped by the sponsoring organization for which she or he mediates. A mediator should make an inquiry of the parties and participants prior to the time of the mediation regarding potential conflicts of interest. Given the central role that a mediator's impartiality assumes to promote the integrity and effectiveness of the mediation process, a mediator should avoid conduct that undermines the public's or party's perception of her or his impartiality. This duty to avoid conflicts of interest exists at the pre-mediation stage, during the mediation conference, and following the mediation session.
- 2.** Disclosure of relationships or circumstances that would create the potential for a conflict of interest rests on the mediator and should be made at the earliest possible opportunity and under circumstances that will allow the parties to freely exercise their right of self-determination as to both the selection of the mediator and participation in the mediation process.
- 3.** Development of relationships by the mediator following the mediation with persons, organizations or agencies that might create a perceived or actual conflict of interest depend upon considerations such as time elapsed following the mediation and the nature of the relationship established and services offered.

## **STANDARD IV: COMPETENCE**

- A.** A mediator shall mediate only when the mediator has the necessary competence to satisfy the reasonable expectations of the parties and the sponsoring organization for which she or he mediates.
- B.** If a mediator cannot satisfy this Standard, the mediator shall immediately notify the parties and take steps reasonably appropriate under the circumstances, including declining or withdrawing from the mediation or, where appropriate, obtaining assistance from others.
- C.** A mediator shall not conduct any aspect of a mediation while impaired by drugs, alcohol, medication or otherwise.

## **COMMENTS:**

- 1.** A mediator should obtain the training, skills, experience in mediation, cultural understanding, and other qualities that are necessary for effective mediation, consistent with the sponsoring organization for which he or she mediates.
- 2.** A mediator should inform the parties, where necessary or when asked, of information relevant to the mediator's training, education and experience.<sup>10</sup>
- 3.** A mediator should attend educational programs and related activities to enhance and strengthen his or her personal knowledge of and skills in the mediation process, consistent with the sponsoring organization for which she or he mediates.

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<sup>10</sup>Under the CDRC Program Manual and as required by Article 21-A of the New York State Judiciary Law governing all New York State community dispute resolution center programs, community mediators are required to complete a minimum of 30 hours of initial training, followed by a supervised apprenticeship at the center where they volunteer prior to becoming a community mediator for that center (CDRCP Program Manual, Ch. 7, Section I. A.(1) (revised January 1, 2007)). Additional training is required for community mediators who mediate disputes in family cases, youth cases, and civil, city, and district court cases (CDRCP Program Manual, Ch. 7, Section I. A.(5)).

## STANDARD V: CONFIDENTIALITY

- A. A mediator shall maintain the confidentiality of all information obtained by the mediator during a mediation, including information obtained from the parties, non-party participants or documents shown to the mediator, with the exception of any allegation of child abuse.<sup>11</sup>

### COMMENTS:

1. All mediations that are conducted by mediators on behalf of a New York State community resolution center are protected by a confidentiality statute, Article 21-A of the New York State Judiciary Law.<sup>12</sup>
2. If an allegation of child abuse is made during the mediation, the mediator is required to stop the mediation process, consult with each party individually for the purpose of obtaining as much information about the circumstances as possible, and consult with center program staff to determine whether to resume the mediation process.<sup>13</sup>
3. A mediator who meets with a party in private session during a mediation should not convey directly or indirectly to any other party, group or institution any information that was obtained during that private session without the consent of the disclosing party.
4. A mediator may report, pursuant to the policies of the local center, whether parties appeared at a scheduled mediation and whether or not the parties reached a resolution.<sup>14</sup>
5. Nothing in this Standard should be construed to prohibit monitoring, research, and evaluation of mediation activities or the continuing education of mediators.
6. Nothing in this Standard should be construed to prohibit a mediator from disclosing necessary information to staff of the sponsoring organization for which she or he mediates.

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<sup>11</sup>All centers deem allegations or evidence of child abuse inappropriate for mediation; accordingly, this information is not deemed confidential pursuant to Formal Opinion No. 83-F17 of the New York State Attorney General (1983).

<sup>12</sup>This statute protects all memoranda, work product and case files from disclosure in judicial or administrative proceedings and deems confidential all communications that relate to the subject matter of the dispute resolution proceeding. Mediators at community dispute resolution center programs may request participants to sign a written consent form agreeing to mediate in order to ensure full protection under Article 21-A (1981).

<sup>13</sup>CDRCP Program Manual, Ch. 5, Section II. A., Guideline IV. New York State CDRCP mediators are required to be aware of these Guidelines (revised May 10, 2012).

<sup>14</sup>See generally CDRC Program Manual.



## STANDARD VI: QUALITY OF THE PROCESS

- A. A mediator shall conduct a quality mediation process that is consistent with these Standards of Conduct.
- B. A mediator shall terminate the mediation, withdraw from service, or take other appropriate steps if she or he believes that participant conduct, including that of the mediator, jeopardizes sustaining a quality mediation process.
- C. A mediator shall not exclude a party's attorney from a mediation session, including an attorney for the child.

### COMMENTS:

- 1. A mediator should agree to mediate only when he or she is prepared to commit the attention essential to an effective mediation.
- 2. A mediator should only accept cases when she or he can satisfy the reasonable expectation of the parties concerning the timing of the process.
- 3. A mediator should only accept cases when he or she can satisfy the reasonable expectation of the parties concerning his or her experience and training based on the guidelines of the sponsoring organization for which the mediator mediates.
- 4. The mediator should respect the decision of a party who chooses not to participate in the presence of another party's attorney or another third party (see *Committee Notes*)
- 5. The primary purpose of a mediator is to help the parties communicate, negotiate, and/or make decisions. This role differs substantially from other professional client relationships. Mixing the role of a mediator and the role of a professional advising a client is problematic, and mediators should strive to distinguish between the roles. A mediator should therefore refrain from providing professional advice. Where appropriate, a mediator should recommend that parties seek outside professional advice or services, or consider resolving their dispute through arbitration, neutral evaluation, or another dispute resolution process.
- 6. A mediator should not conduct a dispute resolution procedure other than mediation but attempt to characterize it as mediation in an effort to gain the protection of rules, statutes or other governing authorities pertaining to mediation.
- 7. A mediator who undertakes, at the request of the parties, an additional dispute resolution role in the same matter assumes increased responsibilities and obligations that may be governed by the standards of other professions.
- 8. If a party appears to have difficulty comprehending the process, issues or settlement options, or difficulty participating in the mediation process, 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 no such option can be reasonably provided, the mediator should take other appropriate steps, including

postponing the session, withdrawing from the mediation or terminating the mediation.

9. A mediator should postpone the session or take other appropriate steps if he or she becomes aware that a party is unable to participate due to drug or alcohol use.
10. If a mediation is being used to further illegal conduct, a mediator should take appropriate steps to insure a quality process including, if necessary, postponing the session, withdrawing from the mediation or terminating the mediation.
11. A mediator has an ongoing obligation to be sensitive to power imbalances between the parties and to ensure that the mediation process is conducted in a manner consistent with these Standards. If the mediator cannot ensure a quality process, the mediator should take appropriate steps to postpone the session, withdraw from the mediation or terminate the mediation.<sup>15</sup> (see *Committee Notes*)
12. A mediator is responsible for confirming with the parties that mediation is an appropriate dispute resolution process under the circumstances of each case.<sup>16</sup>
13. A mediator should consult with center staff if a party reveals or the mediator is otherwise made aware of a credible threat of serious and imminent physical harm to the speaker or to center staff.

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<sup>15</sup>Such power imbalances include where a party threatens, intimidates, or otherwise coerces the other party into participating in or reaching a desired result in the mediation.

<sup>16</sup> FLA Rule 10.400. Mediator's Responsibility to the Mediation Process.

## **STANDARD VII: ADVERTISING AND SOLICITATION**

- A.** A mediator shall be truthful and not misleading when advertising, soliciting or otherwise communicating his or her qualifications, experience, and range of available professional services.

### **COMMENTS:**

- 1.** Communications, including business cards, letter heads, or computer based communications, should not include any statistical settlement data or any promises as to outcome.
- 2.** Communications may include references to a mediator's fulfilling state, national or private organization qualifications only if the entity referred to has a procedure for qualifying mediators, and the mediator has been duly granted the requisite status.<sup>17</sup>
- 3.** A mediator should not solicit in a manner that could give an appearance of partiality for or against a party.
- 4.** A mediator should not list names of clients or persons served in promotional materials and communications without their permission.

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<sup>17</sup>The New York State Office of ADR Programs does not certify mediators. Under the CDRC Program Manual, however, mediators may obtain certification by a local center by completing an initial community training that is at least 30 hours in duration and conducted by a trainer who has been certified by the New York State Office of ADR Programs, followed by an apprenticeship at the center, a performance evaluation under the supervision of the center's Program Director, and an assessment by the Director that the mediator is prepared to mediate pursuant to the center's performance standards (Ch. 7, Section 1.A.(1)).

## **STANDARD VIII: RESPONSIBILITIES TO THE MEDIATION PROFESSION**

**A.** A mediator shall act in a manner that enhances the growth and quality of the mediation profession.

**COMMENTS:** Any person offering mediation services under the auspices of a New York State Community Dispute Resolution Program is considered to be a member of the mediation profession. Among other activities, a mediation professional should:

1. Foster diversity in the mediation field, reaching out to individuals with differing backgrounds and perspectives.
2. Strive 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. Participate in research in the field when given the opportunity, including obtaining participant feedback when appropriate.
4. Participate in outreach and education efforts to assist the public in developing an improved understanding of, and appreciation for, mediation.
5. Assist newer mediators through training, mentoring and networking.
6. Exhibit tolerance of differing points of view within the field, seeking to learn from one another and work together to improve the profession and better serve people in conflict.

## **COMMITTEE NOTES**

***These Committee Notes contain annotations to the Introduction and “Comments” listed under each Standard. The Committee Notes include both “General Notes” and “Comment Notes.” The General Notes contain introductory comments by the Committee and the Comment Notes clarify, define, and expand upon the specific Comment to which they refer. This section may be updated as necessary by the Mediator Ethics Advisory Committee (“Committee”).***

### ***Introduction to Committee Notes***

Where a mediator is unable to resolve an ethical dilemma after reading these Standards as a whole, or finds that a certain Standard conflicts with another Standard contained therein, the mediator is encouraged to address this concern in writing to the Committee. In the interim, a mediator may look to other applicable professional rules or standards within the mediation field. Specific reference should be made to the Community Dispute Resolution Program Manual as a general rule, but particularly in circumstances that require immediate and decisive action by a mediator. Such instances may include where a party is in danger by the other party due to domestic violence, or the particular protocol a mediator should employ if a party reveals or the mediator is otherwise made aware of an allegation of child abuse. A mediator might also look to the Model Standards of Practice for Family and Divorce Mediation, that specifically addresses ethical practice for mediators of family cases (Symposium on Standards of Practice August 2001).

## **STANDARD I. SELF-DETERMINATION**

### ***General Notes***

Practitioners and scholars cite self-determination as the fundamental principle of mediation. Comments for Standard I, however, identify how this principle might conflict with other Standards and suggest that a mediator’s duty, in limited circumstances, may override this principle.

### ***Comment Notes***

#### **Comment 4.**

The Committee recognizes that power imbalances are an inherent part of mediation between any two parties, based on many factors including informational, emotional, or verbal differences, or even due to the disparity between the numbers of parties at the table. However, since the issue of power at the mediation table concerns the fundamental principle of self-determination, the mediator should be sensitive to any significant challenge to a party’s ability to freely and willingly make decisions regarding his or her own future. Such circumstances include where one party is threatening, intimidating, or otherwise manipulating the other party through either words or actions. In those cases the mediator should take immediate action to either postpone the session, withdraw from the mediation or terminate the mediation.

#### **Comment 3.**

### ***General Notes***

Party self-determination means that parties are free to make voluntary and uncoerced procedural and substantive decisions, including whether to make an informed choice to agree or not agree. In order to make an informed choice, one of the mediator’s roles is to

make the parties aware that they may consult other professionals at any point in the mediation process. In addition, to ensure a quality mediation process, the mediator should not mix the role of mediator with that of any other professional role. While a mediator may hold specialized knowledge, due to the mediator's profession or area of expertise, a mediator should only be acting as a mediator when mediating and not in any other professional role.

### **Comment Notes**

The Committee recognizes that the mediator may have specialized knowledge, due to the mediator's professional role or area of expertise, as stated in Standard VI. Quality of the Process, Comment 5. Sometimes this knowledge can impact what the mediator believes to be the potential outcome of the parties' decisions (for example, the mediator is an attorney and is aware of a particular law that impacts the parties' agreement). However, even if the mediator were correct and this knowledge would impact the parties' agreement, the mediator must be careful to assist the parties in making informed choices without providing direct (professional) advice, legal, therapeutic or otherwise. Since, as Standard I. Self-Determination, Comment 3. states, the mediator's role is solely to help the parties make informed choices at any point during the mediation process, the mediator must find a balance between making the parties aware that they may consult other professionals to help them make informed choices with providing specific advice based on the mediator's specialized knowledge.

When faced with this dilemma, the mediator can assist the parties by questioning their understanding of the implications of their decisions and making them aware that they may consult with other professionals regarding any decisions they make or would like to make. The mediator should take care to question the parties in a balanced way, so that both parties are receiving the same consideration.

Committee Opinions for reference: 2008-02, 2009-01.

## **STANDARD II: IMPARTIALITY**

### **Comment Notes**

#### **Comment 1.**

The Committee's intention in this Comment is to reflect all possible bases of bias that may cause a mediator to act with partiality. The classes of persons listed under this Comment are provided as examples, and are not intended to serve as an exhaustive or exclusive list.

The Committee's emphasis is on the mediator's action with regard to any bias he or she may hold. A mediator who may have a particular bias towards a party for any reason must not act with partiality due to her or his views. A mediator who is unable to act in an impartial, neutral way towards all parties in the dispute must decline to mediate or withdraw from the mediation.

## STANDARD V. CONFIDENTIALITY

### Comment 6.

#### *General Notes*

While a mediator shall maintain the confidentiality of all information obtained by the mediator during a mediation, except any allegation of child abuse, that does not prohibit a mediator from disclosing necessary information to staff. If a mediator becomes aware of or suspects that a crime may be or may have been committed, then the mediator should consult with staff regarding next steps without delay.

#### Comment Notes

The Committee does not want to put the mediator in the position of making determinations as to what is legal, since it is beyond the scope of the mediator's role. When the mediator is faced with a situation where there is a concern about the legality of a certain action or a fear of something illegal taking place, the mediator should disclose this information to center staff, as indicated in Standard V. Confidentiality, Comment 6. The mediator must also consider Standard VI. Quality of the Process, Comment 10. at this time, and, if a mediation is being used to further illegal conduct, the mediator should take appropriate steps to insure a quality process, including, if necessary, postponing the session, or withdrawing from or terminating the mediation.

Committee Opinions for reference: 2006-02, 2006-03, 2008-01.

## STANDARD VI: QUALITY OF THE PROCESS

### Comment Notes

#### Comment 4.

A center must permit all parties to appear with representatives, including counsel, and to present all relevant evidence relating to the dispute, including calling and examining witnesses (22 New York Code of Rules and Regulations Part 116.3(I); see also and CDRC Program Manual, Ch. 5, Section IV. B.(3)). Parties who speak another language are afforded the assistance of a court interpreter, who must be present in the mediation (although no direct authority addresses this, this practice is recognized by centers as an "equal access to justice" issue; indirectly, this practice is covered under CDRC Program Manual Ch. 5, Section IV. B.(4), centers shall not discriminate on the basis of age, sex, religion, creed, ethnic origin, sexual orientation or disability) (emphasis added). Parties may also request the presence of other third parties, such as friends and/or family for support. Prior to the mediation, both parties should determine together if these third parties will participate in the session.

#### Comment 5.

#### *General Notes*

Party self-determination means that parties are free to make voluntary and uncoerced procedural and substantive decisions, including whether to make an informed choice to agree or not agree. In order to make an informed choice, one of the mediator's roles is to make the parties aware that they may consult other professionals at any point in the mediation process. In addition, to ensure a quality mediation process, the mediator should not mix the role of mediator with that of any other professional role. While a

mediator may hold specialized knowledge, due to the mediator's profession or area of expertise, a mediator should only be acting as a mediator when mediating and not in any other professional role.

### **Comment Notes**

The Committee recognizes that the mediator may have specialized knowledge, due to the mediator's professional role or area of expertise, as stated in Standard VI. Quality of the Process, Comment 5. Sometimes this knowledge can impact what the mediator believes to be the potential outcome of the parties' decisions (for example, the mediator is an attorney and is aware of a particular law that impacts the parties' agreement). However, even if the mediator were correct and this knowledge would impact the parties' agreement, the mediator must be careful to assist the parties in making informed choices without providing direct (professional) advice, legal, therapeutic or otherwise. Since, as Standard I. Self-Determination, Comment 3. states, the mediator's role is solely to help the parties make informed choices at any point during the mediation process, the mediator must find a balance between making the parties aware that they may consult other professionals to help them make informed choices with providing specific advice based on the mediator's specialized knowledge.

When faced with this dilemma, the mediator can assist the parties by questioning their understanding of the implications of their decisions and making them aware that they may consult with other professionals regarding any decisions they make or would like to make. The mediator should take care to question the parties in a balanced way, so that both parties are receiving the same consideration.

Committee Opinions for reference: 2008-02, 2009-01.

### **Comment 10.**

#### ***General Notes***

While a mediator shall maintain the confidentiality of all information obtained by the mediator during a mediation, except any allegation of child abuse, that does not prohibit a mediator from disclosing necessary information to staff. If a mediator becomes aware of or suspects that a crime may be or may have been committed, then the mediator should consult with staff regarding next steps without delay.

### **Comment Notes**

The Committee does not want to put the mediator in the position of making determinations as to what is legal, since it is beyond the scope of the mediator's role. When the mediator is faced with a situation where there is a concern about the legality of a certain action or a fear of something illegal taking place, the mediator should disclose this information to center staff, as indicated in Standard V. Confidentiality, Comment 6. The mediator must also consider Standard VI. Quality of the Process, Comment 10. at this time, and, if a mediation is being used to further illegal conduct, the mediator should take appropriate steps to insure a quality process, including, if necessary, postponing the session, or withdrawing from or terminating the mediation.

Committee Opinions for reference: 2006-02, 2006-03, 2008-01.



## **Comment 11.**

### **Comment Notes**

A mediator has a duty to conduct a quality mediation process. The quality of the process, consistent with the Standards, requires the mediator to conduct a process that supports party self-determination, with impartiality, no conflicts of interest, competence, and by upholding the confidentiality of the parties (with the exception of child abuse). Specifically, this Comment refers to the Standard of Self-Determination (Standard I.). As the Committee states in Committee Notes to Standard I. Self-Determination, Comment 4., any significant challenge to a party's ability to self-determine or freely and willingly make decisions regarding his or her own future should be a concern to the mediator, such as when one party is threatening, intimidating, or otherwise manipulating the other party through either words or actions. In such circumstances, the mediator should take immediate action to either postpone the session, withdraw from the mediation or terminate the mediation.

### **Revision to Standard VI. Quality of the Process, C.**

This new language has been added in order to ensure that a necessary party to a mediation is not excluded from the session.

While the Committee requires the mediator to not exclude the attorney for the child, the Committee also recognizes that the CDRCs play an active role in ensuring that the stakeholders in the mediation process in cases where an attorney for the child would be appointed -- generally Family Court personnel and other professionals who are integrally involved in a system based case such as a caseworker/ supervisor, in addition to the parties -- are routinely notified of scheduled mediation sessions and have an equal chance of participation

The CDRC Program Manual recognizes the importance of including all necessary parties in the mediation process (Chapter 5, Operational Policies, IV.B.1.3.) and this is reinforced through mediator's initial training as well (Chapter 7, Standards and Guidelines for Mediators and Mediation Trainers, III., 8.).

## DEFINITIONS

**Conflict of Interest:** A person has a conflict of interest when a person is in a position that requires him or her to exercise judgment on behalf of others and also has interests or obligations that might interfere with the exercise of his or her judgment.<sup>18</sup>

**Impartiality:** Impartiality means freedom from favoritism or prejudice in word, action or appearance.

**Mediation:** For the purpose of these Standards, mediation is defined as a confidential, informal procedure in which a neutral third party helps disputants communicate, negotiate, and/or make decisions. With the assistance of a mediator, parties identify issues, clarify perceptions and explore options for a mutually acceptable outcome.

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<sup>18</sup>[www.unmc.edu/ethics/words.html](http://www.unmc.edu/ethics/words.html).

## APPENDIX

### ARTICLE 21-A COMMUNITY DISPUTE RESOLUTION CENTERS PROGRAM

Section	849-a. Definitions.
	849-b. Establishment and administration of centers.
	849-c. Application procedures.
	849-d. Payment procedures.
	849-e. Funding.
	849-f. Rules and regulations.
	849-g. Reports.

**S 849-a. Definitions. For the purposes of this article:**

1. "Center" means a community dispute center which provides conciliation, mediation, arbitration or other forms and techniques of dispute resolution.
2. "Mediator" means an impartial person who assists in the resolution of a dispute.
3. "Grant recipient" means any nonprofit organization that administers a community dispute resolution center pursuant to this article, and is organized for the resolution of disputes or for religious, charitable or educational purposes.

**S 849-b. Establishment and administration of centers.**

1. There is hereby established the community dispute resolution center program, to be administered and supervised under the direction of the chief administrator of the courts, to provide funds pursuant to this article for the establishment and continuance of dispute resolution centers on the basis of need in neighborhoods.
2. Every center shall be operated by a grant recipient.
3. All centers shall be operated pursuant to contract with the chief administrator and shall comply with all provisions of this article. The chief administrator shall promulgate rules and regulations to effectuate the purposes of this article, including provisions for periodic monitoring and evaluation of the program.
4. A center shall not be eligible for funds under this article unless:
  - (a) it complies with the provisions of this article and the applicable rules and regulations of the chief administrator;
  - (b) it provides neutral mediators who have received at least twenty-five hours of training in conflict resolution techniques;
  - (c) it provides dispute resolution without cost to indigents and at nominal or no cost to other participants;
  - (d) it provides that during or at the conclusion of the dispute resolution process there shall be a written agreement or decision setting forth the settlement of the issues and future responsibilities of each party and that such agreement or decision shall be available to a court which has adjourned a pending action pursuant to section 170.55 of the criminal procedure law;
  - (e) it does not make monetary awards except upon consent of the parties and such awards do not exceed the monetary jurisdiction of the small claims part of the justice court, except that where an action has been adjourned in contemplation of dismissal pursuant to section 215.10 of the criminal procedure law, a monetary award not in excess of five thousand dollars may be made; and
  - (f) it does not accept for dispute resolution any defendant who is named in a filed felony complaint, superior court information, or indictment, charging: (i) a class A felony, or (ii) a violent felony offense as defined in section 70.02 of the penal law, or (iii) any drug offense as defined in article two hundred twenty of the penal law, or (iv) a felony upon the conviction of which defendant must be sentenced as a second felony offender, a second violent felony offender, or a persistent violent felony offender pursuant to sections 70.06, 70.04 and 70.08 of the penal law, or a

felony upon the conviction of which defendant may be sentenced as a persistent felony offender pursuant to section 70.10 of such law.

5. Parties must be provided in advance of the dispute resolution process with a written statement relating:

- (a) their rights and obligations;
- (b) the nature of the dispute;
- (c) their right to call and examine witnesses;
- (d) that a written decision with the reasons therefor will be rendered; and
- (e) that the dispute resolution process will be final and binding upon the parties.

6. Except as otherwise expressly provided in this article, all memoranda, work products, or case files of a mediator are confidential and not subject to disclosure in any judicial or administrative proceeding. Any communication relating to the subject matter of the resolution made during the resolution process by any participant, mediator, or any other person present at the dispute resolution shall be a confidential communication.

#### **S 849-c. Application procedures.**

1. Funds appropriated or available for the purposes of this article may be allocated for programs proposed by eligible centers. Nothing in this article shall preclude existing resolution centers from applying for funds made available under this article provided that they are otherwise in compliance with this article.

2. Centers shall be selected by the chief administrator from applications submitted.

3. The chief administrator shall require that applications submitted for funding include, but need not be limited to the following:

- (a) The cost of each of the proposed centers components including the proposed compensation of employees.
- (b) A description of the proposed area of service and number of participants who may be served.
- (c) A description of available dispute resolution services and facilities within the proposed geographical area.
- (d) A description of the applicant's proposed program, including support of civic groups, social services agencies and criminal justice agencies to accept and make referrals; the present availability of resources; and the applicant's administrative capacity.
- (e) Such additional information as is determined to be needed pursuant to rules of the chief administrator.

#### **S 849-d. Payment procedures.**

1. Upon the approval of the chief administrator, funds appropriated or available for the purposes of this article shall be used for the costs of operation of approved programs. The methods of payment or reimbursement for dispute resolution costs shall be specified by the chief administrator and may vary among centers. All such arrangements shall conform to the eligibility criteria of this article and the rules and regulations of the chief administrator.

2. The state share of the cost of any center approved under this section shall include a basic grant of up to twenty thousand dollars for each county served by the center and may include an additional amount not exceeding fifty per centum of the difference between the approved estimated cost of the program and the basic grant.

#### **S 849-e. Funding.**

1. The chief administrator may accept and disburse from any public or private agency or person, any money for the purposes of this article.

2. The chief administrator may also receive and disburse federal funds for purposes of this article, and perform services and acts as may be necessary for the receipt and disbursement of such federal funds.

- (a) A grant recipient may accept funds from any public or private agency or person for the purposes of this article.
- (b) The state comptroller, the chief administrator and their authorized representatives, shall have the power to inspect, examine and audit the fiscal affairs of the program.
- (c) Centers shall, whenever reasonably possible, make use of public facilities at free or nominal cost.

**S 849-f. Rules and regulations.**

The chief administrator shall promulgate rules and regulations to effectuate the purposes of this article.

**S 849-g. Reports.**

Each resolution center funded pursuant to this article shall annually provide the chief administrator with statistical data regarding the operating budget, the number of referrals, categories or types of cases referred, number of parties serviced, number of disputes resolved, nature of resolution, amount and type of awards, rate of compliance, returnees to the resolution process, duration and estimated costs of hearings and such other information the chief administrator may require and the cost of hearings as the chief administrator requires. The chief administrator shall thereafter report annually to the governor and the and the temporary president of the senate, speaker of the assembly, and chairpersons of the judiciary and children and families committees regarding the operation and success of the centers funded pursuant to this article. The chief administrator shall include in such report all the information for each center that is required to be in the report from each center to the chief administrator.