

STANDARDS OF CONDUCT FOR MEDIATORS¹

New York State Unified Court System

Preamble, scope, and purpose: These Standards of Conduct are designed to guide the conduct of mediators, inform mediating parties, and promote public confidence. Standards reflect mediators' obligations toward the parties, the public, the courts and referring agencies. These Standards apply to all mediators in trial court-connected mediation programs in the New York State Unified Court System.

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.

- 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.

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.

Mediation; defined: Mediation is a confidential dispute resolution process in which a neutral third party, the mediator, helps parties to communicate, identify issues, clarify perceptions, and explore options for a mutually acceptable outcome.

- I. **Principle of Self-Determination:** Mediation is based on the fundamental principle of self-determination by the parties. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices.
 - A. A mediator shall inform the parties that mediation is consensual in nature, that the mediator is impartial, that any party may withdraw from mediation in accordance with relevant local and statewide rules of the court, and that the mediator may not impose or force any settlement on the parties.

¹ Modeled substantially after the standards of conduct for mediators separately published by the New Jersey state courts, Maryland state courts, Michigan state courts, and the American Arbitration Association, American Bar Association, Association of Conflict Resolution.

- B. Because a mediator cannot personally ensure that each party has made a fully informed choice to reach or finalize a particular agreement, a mediator should make the parties aware of the importance of consulting other professionals, including attorneys, to help them make informed decisions.
 - C. 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 the mediation process when a mediator believes a party cannot effectively participate.
- II. Impartiality:** A mediator shall always conduct mediation sessions in an impartial manner. Impartiality means freedom from favoritism, bias, or prejudice. A mediator shall only mediate a dispute in which there is reason to believe that impartiality can be maintained. When a mediator is unable to conduct the mediation in an impartial manner, as determined by the mediator or any party, the mediator shall decline appointment by the court or otherwise withdraw from the mediation.
- A. A mediator shall not favor or disfavor any participant for any reason, such as the participant's race, ethnicity, age, sex, gender identity, sexual orientation, disability, appearance, personal characteristics, background, values, beliefs, actions, or behavior. A mediator shall avoid any conduct that even lends the appearance of either favoring or disfavoring any party.
 - B. A mediator shall make an effort to be aware of the mediator's biases and should learn about and manage unconscious and implicit biases.
 - C. A mediator shall not offer, give, solicit, or accept any gift or gratuity before, during or after a mediation, if doing so might reasonably raise a question about the mediator's impartiality.
- III. Conflicts of Interest:** A mediator shall avoid a conflict of interest or the appearance of a conflict of interest both during and after mediation. A conflict of interest is a dealing or relationship that could reasonably be viewed as creating an impression of possible bias or as raising a question about the mediator's impartiality or self-interest.
- A. 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 or indicate bias of the mediator. The duty to inquire continues throughout the mediation process.
 - B. A mediator shall promptly disclose conflicts of interest, grounds of bias or partiality known to the mediator. A mediator should resolve all doubts in favor

of disclosure. Where possible, such disclosure should be made early in the mediation process and in time to allow the participants to select an alternate mediator. The duty to disclose continues throughout the mediation process.

- C. After disclosure, a 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.
- D. If a mediator's conflict of interest could be reasonably viewed as undermining the integrity of the mediation process, the mediator shall withdraw from or decline to proceed with the mediation regardless of the express agreement of the parties to the contrary.
- E. A mediator shall not establish another relationship with any of the participants during the mediation process that would raise reasonable questions about the integrity of the mediation process, or impartiality of the mediator, without the consent of all parties.
- F. In considering whether establishing a personal or another professional relationship with any of the participants after the conclusion of the mediation process might create a perceived or actual conflict of interest, the mediator should consider factors such as time elapsed since the mediation, consent of the parties, the nature of the relationship established, and services offered.

IV. Mediator Competence: A mediator shall mediate only when the mediator possesses the necessary and required qualifications, temperament, and familiarity with the general principles of the subject matter involved in the case being mediated.

- A. A mediator should make information regarding the mediator's training, education, experience, and approach to conducting mediation available to the parties.
- B. Mediation practice requires awareness to assess one's own competence based on the circumstances in each mediation. If a mediator cannot conduct the mediation competently or is impaired, the mediator shall advise 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.
- C. A mediator should attend continuing educational and training programs and engage in self-assessment and peer consultation to maintain and enhance the mediator's knowledge and skills related to mediation.

- V. Confidentiality²:** A mediator shall maintain the confidentiality of all information obtained by the mediator in mediation unless disclosure is required or authorized by applicable law.
- A. At the first contact with the parties, and as necessary throughout the mediation process, a mediator should:
 - 1. Inform the participants of the mediator's obligations regarding confidentiality including any exceptions thereto.
 - 2. Discuss with the parties their expectations of confidentiality; and
 - 3. Discuss confidentiality of private sessions with parties or participants prior to those sessions occurring; those sessions shall be confidential unless agreed otherwise.
 - B. A mediator should include a statement concerning the obligations of confidentiality in a written agreement to mediate.
 - C. If ordered or requested to testify or to produce documents, a mediator shall promptly inform the parties or their counsel. A mediator should consider confidentiality obligations in determining how to respond.
 - D. If a mediator participates in teaching, research, or evaluation of mediation, the mediator should protect the anonymity of the parties and abide by the obligations and agreements regarding confidentiality.
- VI. Quality of the Process:** A mediator shall conduct the mediation in a manner that protects the quality of the mediation process.
- A. **Process:** A mediator shall conduct 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 can commit the attention essential to an effective mediation.
 - b. A mediator should accept cases only when the mediator can satisfy the reasonable expectations of the parties concerning the timing of mediation.

² Nothing contained herein should be construed as superseding or otherwise altering any statutory provision under Article 21-A of the Judiciary Law.

2. **Participants and Participation:** A mediator shall assist in determining the presence of the appropriate participants and their understanding of the mediation process. Unless otherwise ordered by the court, the presence or absence of persons at a mediation should be determined by the parties and the mediator.
3. **Procedural Fairness:** A mediator shall conduct mediation with procedural fairness.
 - a. A 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 mediator's impartiality and inability to 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 of the obligation or policy to report at the first contact.
4. **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 agreement. A mediator shall remain neutral as to terms of a settlement.
 - a. A mediator should not simultaneously act in the role of any other profession while mediating. Acting in the role of another profession before or after mediation may also create a conflict of interest or affect the impartiality of a mediator.
 - b. A mediator should inform unrepresented parties that the mediator is not representing them. A mediator should explain the difference between the role of a mediator and a lawyer's role in representing a client. [Lawyers serving as mediators remain subject to and should consult the Rules of Professional Conduct including Rule 2.4.] A mediator should inform the participants that they may obtain independent advice from lawyers and other professionals.
 - c. 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.
 - d. Where appropriate, a mediator may recommend that parties consider other dispute resolution processes.

- e. 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.
 - 5. **When Mediation is Not Appropriate:** In certain circumstances, a mediator may need to suspend or terminate the mediation process.
 - a. **Safety:** A mediator should periodically assess whether mediation is physically or emotionally unsafe for any participant, or that conditions exist which would impede the achievement of a voluntary and safe resolution of issues. A mediator may suspend or terminate the mediation process when the mediator reasonably believes that a participant is unsafe or unable to effectively participate in mediation.
 - b. **Unlawful Conduct:** If a mediator believes that mediation is being used to further illegal or criminal conduct, the mediator should take appropriate steps, including, if necessary, postponing a mediation session or withdrawing from or terminating the mediation.
 - c. **Process for Ending Mediation:** If a mediator suspends or terminates the mediation, the mediator should take reasonable steps to minimize danger, prejudice, or inconvenience to the parties or others that may result.
 - B. A mediator shall not discourage or prevent a party from seeking independent legal advice.
- VII. Fees for Service:** This section applies to any mediation in which a mediator may charge fees at any stage of the mediation process.
- A. If the court has rules for mediator fees, a mediator should ensure that their fee structure is consistent with those rules or protocols.
 - B. A mediator shall fully disclose and explain in plain language any and all applicable fees and charges during the initial contact. A mediator shall provide this information to the parties both verbally and in writing as soon as practicable.
 - C. A mediator shall not enter into a fee agreement in which the amount of the fee is contingent upon the result of the mediation or the financial amount of the settlement.

- D. A mediator shall not charge or accept fees in a manner that impairs, or may appear to impair, the mediator's impartiality.
- E. A mediator may accept unequal fee payments from the parties unless the fee arrangement would adversely impact the mediator's ability to conduct a mediation in an impartial manner.
- F. Any unearned fees shall be returned to the parties.
- G. A mediator shall not accept a fee, or any other benefit, for referral of a matter to anyone.

VIII. Advancement of Mediation

- A. A mediator should act in a manner that advances mediation. A mediator promotes this Standard by engaging in some or all of the following:
 - 1. Fostering diversity within the field of mediation.
 - 2. Making 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 programs of self-assessment and peer consultation, 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.
 - 6. Demonstrating respect for differing points of view within the field, seeking to learn from other mediators and working together with other mediators to better serve people in conflict and advance the administration of justice.