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MEDIATORS IN NEGOTIATION

APPLYING ETHICAL RULES IN DEALMAKING

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THE SPEAKERS



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OVERVIEW

The Model Standards of Conduct for Mediators

Adopted by:

- American Arbitration Association (September 8, 2005)
- American Bar Association (ABA House of Delegates August 9, 2005)
- Association for Conflict Resolution (August 22, 2005)



MODEL STANDARDS

- I. Self Determination
- II. Impartiality
- III. Conflicts of interest
- IV. Competence
- V. Confidentiality
- VI. Quality of the process
- VII. Advertising and solicitation
- VIII. Fees and other charges
- IX. Advancement of mediation practice





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I. SELF DETERMINATION



SELF DETERMINATION STANDARD

- 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.



SELF DETERMINATION HYPO

In a wrongful termination mediation, plaintiff's lawyer pushes employee to demand a mid-six-figure settlement for lost wages, emotional distress, and attorney's fees. Plaintiff would accept a smaller settlement if she could get her job back.

Defendant knows it is vulnerable, but wants to pay no more than nuisance value to settle the case. Defense counsel coaches defendant to offer a waiver of costs and, if not accepted, threaten to file a motion for summary judgment.

POLL: As the mediator, to ensure self determination, would you:

- a. Suggest how much to offer?
- b. Refuse to deliver offers you feel would not work?
- c. Use your knowledge of the parties' vulnerabilities to reach a deal?





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II. IMPARTIALITY



IMPARTIALITY STANDARD

- A. Decline a mediation if the mediator cannot conduct it in an impartial manner. Impartiality means freedom from favoritism, bias or prejudice.
- B. Conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality.
 - 1. 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. 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. 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. Withdraw if at any time a mediator is unable to conduct a mediation in an impartial manner.



IMPARTIALITY HYPO

At the mediation of a business dispute, mediator is surprised to recognize one of the parties is the high school tennis player who had, in the mediator's view, unfairly beaten the mediator at a tournament. The loss cost the mediator an athletic scholarship. The mediation had been scheduled a while ago and the parties had paid their fees.

POLL: As the mediator, would you:

- a. Not disclose the connection, because you feel you can be impartial?**
- b. Disclose the connection, assure the parties that the past relationship would not prejudice the mediator, and go forward with the mediation?**
- c. Disclose the connection, assure them of your impartiality, and let the parties decide whether to go forward with the mediation?**
- d. Disclose the connection, recuse yourself, cancel the mediation, and refund the money?**





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III. CONFLICT OF INTEREST



CONFLICT OF INTEREST STANDARD

- Avoid a conflict of interest or the appearance of a conflict of interest during and after a mediation.
- 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.
- 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.
- Disclose, as soon as practicable, 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.
- Withdraw from or decline to proceed with the mediation regardless of the expressed desire or agreement of the parties to the contrary, if a mediator's conflict of interest might reasonably be viewed as undermining the integrity of the mediation.
- Not establish another relationship with any of the participants in any matter that would raise questions about the integrity of the mediation, even after the mediation.



CONFLICT OF INTEREST HYPO

Before commencing the mediation of an environmental dispute, mediator learns that the underlying toxic waste allegations might impact the health and safety of the mediator's own neighborhood.

POLL: As the mediator, would you:

- a. Ask whether the scope of the dispute impacts mediator's neighborhood?**
- b. Disclose that the dispute might impact the mediator's neighborhood and the possibility of potential or actual conflict of interest?**
- c. Withdraw from or decline to proceed with the mediation regardless of how the parties feel?**
- d. Not establish another relationship with any of the participants?**





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IV. COMPETENCE



COMPETENCE STANDARD

- Mediate only when the mediator has the necessary competence to satisfy the reasonable expectations of the parties.
- Discuss concerns about mediator competence if discovered during the mediation, take steps to address it, including withdrawing or requesting appropriate assistance.
- Decline to mediate if ability to conduct a mediation is impaired by drugs, alcohol, medication or otherwise.



COMPETENCE HYPO

Mediator represents that the mediator has spoken fluency in Spanish. However, mediator is unable to fully understand legal terms in the language. In addition, mediator suffers from post-COVID 19 brain fog, which exacerbates the mediator's ability to use a second language.

POLL: As the mediator, would you:

- a. Pause the mediation and continue only after you spend time brushing up on Spanish legal terms?**
- b. Discuss concerns about mediator's limited Spanish language capacity, arrange with the parties to secure a qualified Spanish interpreter, or withdraw if this is not possible?**
- c. Decline to mediate, because mediator is impaired by post-COVID 19 brain fog?**





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V. CONFIDENTIALITY



CONFIDENTIALITY STANDARD

- Maintain confidentiality of all information obtained in mediation, unless otherwise agreed to by the parties or required by law.
- Not convey any information obtained during a mediation private session without consent.
- Promote understanding among the parties of the extent to which the parties will maintain confidentiality.
- Parties may make their own specific rules with respect to confidentiality by the mediator.



CONFIDENTIALITY HYPO

On a virtual mediation, the mediator notices that an unknown person, who is not a party to the action, is in the same room as the plaintiff.

POLL: As the mediator, would you:

- a. Ask plaintiff to identify the unknown person?
- b. Inform the unknown person about the rules of confidentiality in mediation?
- c. Ask the unknown person to sign the same mediation confidentiality agreement?





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VI. QUALITY OF THE PROCESS



QUALITY OF THE PROCESS STANDARD

- 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.
- Take appropriate steps, including postponing, withdrawing or terminating mediation if a mediator is made aware of domestic abuse or violence among the parties or violation of these Standards.



QUALITY OF THE PROCESS HYPO

On a virtual mediation, a party is under the influence of drugs, exhibits a serious emotional disability, and participates from a non-private location where members of the public can overhear confidential negotiations.

POLL: As the mediator, would you:

- a. Exclude the party and continue the mediation with that party's counsel only?**
- b. Postpone, terminate or reschedule the mediation at a time when the party can participate while sober and from a private location?**
- c. Recommend that a conservator be appointed for the party so as to ensure fairness in the mediation process?**





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VII. ADVERTISING & SOLICITATION



ADVERTISING & SOLICITATION STANDARD

- Be truthful and not misleading when advertising, soliciting or otherwise communicating the mediator's qualifications, experience, services and fees.
- Not solicit in a manner that gives an appearance of partiality for or against a party or otherwise undermines the integrity of the process.
- Not communicate to others, in promotional materials or through other forms of communication, the names of persons served without their permission.





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VIII. FEES & OTHER CHARGES



FEES & OTHER CHARGES STANDARD

- Provide each party or each party's representative true and complete information about mediation fees, expenses and any other actual or potential charges.
- Not charge fees in a manner that impairs a mediator's impartiality.





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IX. ADVANCEMENT OF MEDIATION PRACTICE



ADVANCEMENT OF MEDIATION PRACTICE STANDARD

Promote this Standard by engaging in:

- Fostering diversity within the field of mediation.
 - 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.
 - Participating in research when given the opportunity, including obtaining participant feedback when appropriate.
 - Participating in outreach and education efforts to assist the public in developing an improved understanding of, and appreciation for, mediation.
 - Assisting newer mediators through training, mentoring and networking.
- A. 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.





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THANK YOU

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