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John D. Feerick

Fordham University School of Law, JFEERICK@law.fordham.edu

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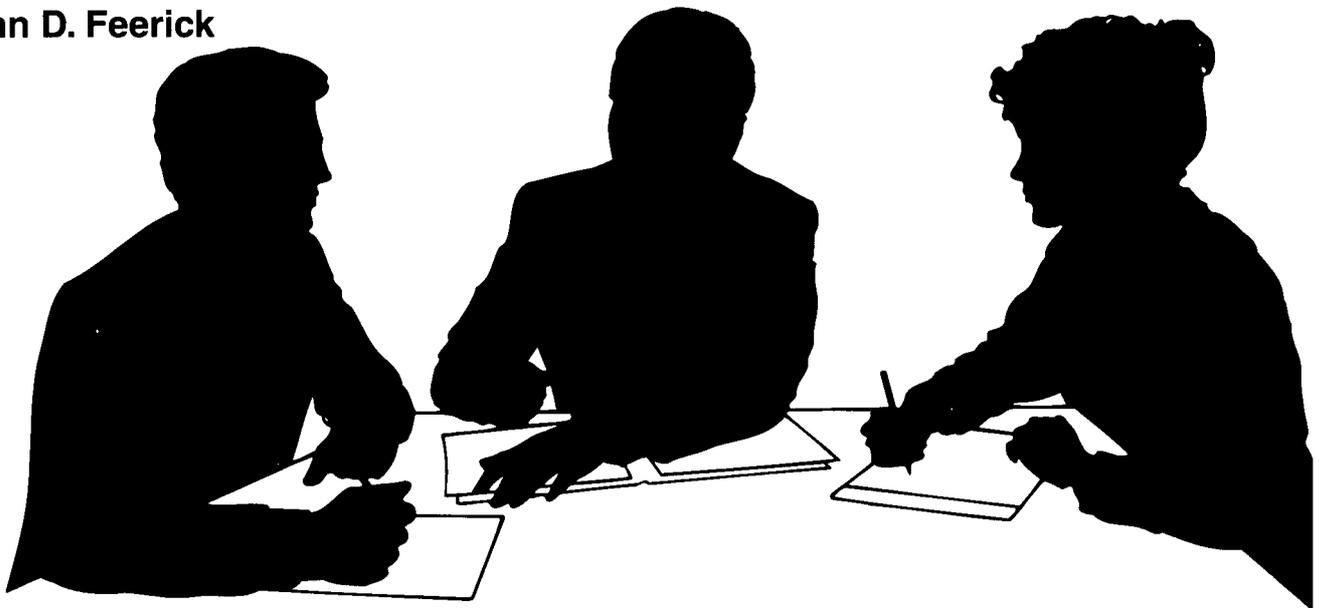
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Standards of Conduct for Mediators

The rapid expansion of mediation, accompanied by an abundance of local and state standards, created a need to develop a set of national ethical norms.

by John D. Feerick



In 1992, the American Arbitration Association, the American Bar Association, and the Society of Professionals in Dispute

JOHN D. FEERICK is dean of Fordham University School of Law.

Resolution (SPIDR) formed a joint committee to develop a code of conduct for mediators. After more than two years of work, the committee

completed and submitted Standards of Conduct for Mediators¹ for approval to their respective associations.

The purpose was to develop a set of standards that could serve as a general framework for mediators, providing them with a helpful tool in their practice. The standards were to be broad enough to cover all types of mediation and flexible enough to evolve over time. The committee did not intend that the standards be a

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1. The committee consisted of John D. Feerick and David A. Botwinik, Esq. for the American Arbitration Association; Dean James J. Alfani and Professor Nancy H. Rogers for the American Bar Association; Ms. Susan Dearborn and Lemoine Pierce, Esq. for the Society of Professionals in Dispute Resolution; former Dean Bryant G. Garth and Professor Kimberlee K. Kovach as reporters; and Frederick E. Woods, Esq. as project staff director. Dean Feerick served as chair of the

final, definitive statement on the practice of mediation. Rather, it hoped that the standards would act as an invitation for further dialogue on the subject of national ethical norms in a rapidly evolving field of dispute resolution.

The impetus for creating a general set of guidelines came from developments within the field itself. In the early 1980s, only a few private mediation firms operated nationwide, compared with more than 800 for-profit and non-profit providers today.² The number of individuals serving as mediators also has grown enormously. Not surprisingly, the expansion of mediation was accompanied by an abundance of local and state standards designed to regulate its use, but there had been no comprehensive standards governing the field.

The joint committee, in formulating its standards, benefitted from the work of community dispute resolution centers, city agencies, professional organizations, and state legislatures. Begun primarily at the community level in informal and mostly volunteer programs, mediation standards now cross disciplinary and professional lines. There are at least 100 codes of conduct in the field of mediation³ and hundreds of state statutes.⁴

In 1982, the Center for Dispute Resolution in Boulder, Colorado, created one of the first sets of ethical standards for mediators, the Code of Professional Conduct, intending it to apply to all types of mediators.⁵ National professional associations, such as SPIDR and the Academy of Family Mediators, similarly enacted standards. Scholars in the field of mediation also have been creative and helpful in advancing ethical standards, most notably the Proposed Standards of Practice for Mediators recommended in 1994 by Professor Robert A. Baruch Bush of Hofstra Law School.

The American Bar Association joined the movement by adopting standards of practice for attorneys acting as mediators in family disputes.⁶ In addition, local and state bar associations, through their ethics committees, have issued opinions and guidelines covering the lawyer-mediator.⁷ A few states, most notably Florida and Hawaii, have developed extensive ethical standards. In 1986, the Supreme Court of Hawaii established guidelines for both public and private mediators,⁸ and in 1992 the Supreme Court of Florida adopted the most comprehensive standards to date, known as the Florida Rules for Certified and Court-Appointed Me-

diators.⁹ The Florida code includes procedural and disciplinary rules as well as ethical standards.¹⁰

Following the 1990 enactment of the Civil Justice Reform Act, federal guidelines and regulations in the area of court-connected mediation substantially increased.¹¹ Federal endeavors relating to mediation had been confined to the District of Columbia Superior Court's Multidoor Courthouse, federal appellate mediation programs, and federal negotiated rule making.¹² Since 1990, however, a number of federal guidelines have been enacted, including court rules in at least 15 federal district courts that provide for mediation programs.¹³ In addition, National Standards for Court-Connected Mediation were established in 1992 "to guide and inform courts interested in initiating, expanding or improving mediation programs," and were intended to apply to court-connected mediation programs of all kinds.¹⁴

This foundation of court and agency standards significantly influenced the joint committee in its work.¹⁵ Also of assistance were comments from across the country after the standards were distributed for public review. Many of these comments were incorporated into the final document. The standards, therefore, are the work product of many individuals with differing and sometimes conflicting viewpoints.

The standards

As proposed by the joint committee, the standards emphasize a mediator's duties to the parties, public, courts, and the mediation process. They are intended to perform three major functions: to serve as a guide for the conduct of mediators, to educate the mediating parties, and to promote public confidence in mediation.

The standards specifically state that their application may be affected by laws or contractual agreements. For example, where there is a conflict between the standards and the rules or regulations of a mediator organization, the latter may take precedence. The committee did not intend that non-compliance with any

committee. The *Standards of Conduct for Mediators* has been approved by the AAA, SPIDR, the Council of the ABA's Section of Dispute Resolution, and the ABA's Litigation Section.

2. Duncan, *Ethics standards for mediation field taking shape*, Chicago Daily Law Bulletin, March 30, 1994, at 1.

3. Kovach, *MEDIATION: PRINCIPLES AND PRACTICE 192* (St. Paul: West Publishing Co., 1994).

4. Rogers and McEwen, *MEDIATION: LAW, PRACTICE, POLICY* (New York: Clark Boardman Callaghan, 1993 Supplement, 1994).

5. The Code of Professional Conduct was adopted by the Colorado Council of Mediators in 1982, and subsequently by a number of other mediation organizations.

6. American Bar Association, Family Law Section, *Standards of practice for lawyer mediators in family disputes*, 18 FAMILY L. Q. 363 (1984).

7. *E.g.* Association of the Bar of the City of New York, Committee on Professional and Judicial Ethics, *Opinion No. 80-23*, 7 FAMILY L. REP. 3097-4100 (1981); Alternative Dispute Resolution Committee of the State Bar of Texas, *ETHICAL GUIDELINES AND STANDARDS OF PRACTICE FOR IMPARTIAL THIRD PARTIES IN THE STATE OF TEXAS Proposed* (1992); Alternative Dispute Resolution (ADR) Section of the Washington State Bar Association, Education and Mediation Committees, *MANUAL ON ALTERNATIVE DISPUTE RESOLUTION* (Seattle: Washington State Bar Association, 1993).

8. Hawaii State Judiciary, Program on Alternative Dispute Resolution, *STANDARDS FOR PRIVATE AND PUBLIC MEDIATORS IN THE STATE OF HAWAII* (1986).

9. Florida Supreme Court, *Florida rules for certified and court-appointed mediators*. No. 78,943. 28 May, 1992.

10. Moberly, *Ethical standards for court-appointed mediators and Florida's mandatory mediation experiment*, 21 FLA. ST. U. L. REV. 701-727 (1994).

11. Rogers and McEwen, *supra* n. 4.

12. *Id.*

13. American Bar Association, Section of Litigation, *REPORT OF THE TASK FORCE ON THE CIVIL JUSTICE REFORM ACT 32-53* (1992).

14. Funded by the State Justice Institute, the *National Standards for Court-Connected Mediation Programs* were developed in 1992 as a joint project of the Center for Dispute Settlement in Washington, D.C. and the Institute of Judicial Administration in New York City.

15. The committee was also substantially influenced by the approach taken by a joint committee of the American Arbitration Association and the American Bar Association in its development of ethical standards for arbitrators of commercial disputes. American Arbitration Association and American Bar Association, *CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES* (New York: American Arbitration Association, 1977).

part of the standards would invalidate a mediation agreement. Rather, the standards are intended as a guide for individual conduct, not as a strict set of rules whose violation will be enforced by sanctions. The effect given to the standards is dependent on each user. If an organization finds the standards not applicable to its specific problems, it is encouraged to make changes.

The standards are divided into nine sections and cover a broad range of topics. Each section states a principle and includes descriptive comments for further understanding and discussion.

1. Self-determination: a mediator shall recognize that mediation is based on the principle of self-determination by the parties.

The standards reaffirm the theory that self-determination is a fundamental principle of mediation, and that the primary role of the mediator is to facilitate a voluntary, uncoerced resolution. A mediator may facilitate communications between the parties, promote understanding of their differences, focus them on their interests, and seek creative solutions to enable them to reach their own agreement.

The committee's comments to the standards provide that a mediator may encourage agreement between the parties by supplying information about the process, raising issues, and helping them explore options. A mediator cannot personally ensure that a party has made a fully informed choice, but he or she should make the parties aware of the importance of consulting other professionals, where appropriate, to assist in making an informed decision. For example, it sometimes will be helpful for a party to consult with a lawyer or other professional during the decision-making process.

2. Impartiality: a mediator shall conduct the mediation in an impartial manner.

A mediator should only mediate those matters in which he or she can remain impartial and should with-

draw if unable to meet such a standard. The comments further state that a mediator should avoid the appearance of partiality toward one of the parties, including partiality based on the parties' personal characteristics, background, or performance at the mediation. An unstated premise is that the quality of the process is enhanced only to the extent the parties have confidence in the mediator's impartiality. When a mediator is appointed by a court or institution, the comments provide that it is the responsibility of the appointing authority to make reasonable efforts to ensure impartiality.

3. Conflicts of interest: a mediator shall 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. The need to protect against conflicts of interest also governs conduct that occurs during and after the mediation.

The standards describe a conflict of interest as "a dealing or relationship that might create an impression of possible bias." Perceived, actual, and potential conflicts of interest are detrimental to the process. Therefore, a mediator must disclose all conflicts, whether potential or actual, that are reasonably known to the mediator and that could reasonably be seen as raising a question about impartiality. A mediator may still mediate a dispute when there are conflicts of interest if all parties agree to proceed after being informed of the conflicts. If, however, a conflict of interest casts serious doubt on the integrity of the process, the comments suggest that the mediator decline to proceed regardless of the consent of the parties.

The standards emphasize that a mediator must avoid the appearance of a conflict after as well as during a mediation. Without the consent of all parties to the mediation, a mediator should not subsequently establish a professional relationship with one of the parties in a related matter, or even in an unrelated matter under circumstances that would raise legitimate

questions about the integrity of the mediation process. In addition, the standards urge a mediator to avoid conflicts of interest in recommending other professionals to assist the parties. The standards seek throughout to promote public confidence in mediation and to discourage conduct that could undermine the process and the field of mediation.

4. Competence: a mediator shall mediate only when the mediator has the necessary qualifications to satisfy the reasonable expectations of the parties.

In order to give full scope to the principle of self-determination, the standards allow any person chosen by the parties to serve as a mediator. They implicitly reject the notion that mediators must have expertise in the particular area involved in a dispute. However, a mediator should have the necessary qualifications to satisfy the reasonable expectations of the parties. Although no specific training is required, often training and experience in mediation is necessary for an effective mediation. Mediators should make available for review information regarding their training, education, and experience.

The standards place particular emphasis on training and experience for court-appointed mediators. The comments require the appointing agency to make reasonable efforts to ensure that each mediator is qualified for the particular mediation. In addition, the requirements needed by qualified mediators must be made available to interested parties.

5. Confidentiality: a mediator shall maintain the reasonable expectations of the parties with regard to confidentiality.

Since the parties' expectations regarding confidentiality are critical, the mediator should ascertain and discuss these expectations with them. The parties' expectations may be shaped by the circumstances of the mediation and any prior confidentiality agreements. A mediator must not disclose any matter that a party expects to be confidential unless

given permission by all parties or unless required by law or other public policy. The comments further state that a mediator should avoid communicating outside the mediation any information about how the parties acted, the merits of the dispute or any settlement offers.

6. Quality of the process: a mediator shall conduct the mediation fairly, diligently, and in a manner consistent with the principle of self-determination by the parties.

One of the pervasive themes throughout the standards is the importance of the quality of the process. The standards consider it a duty of the mediator to work to ensure a quality process. Part of that obligation is a commitment to promote procedural fairness and to provide an environment for adequate self-determination by the parties. The comments suggest various ways a mediator may improve the quality of the process. For example, a mediator should not allow a mediation to be unduly delayed by the parties. In addition, a mediator should agree to mediate only when prepared to commit the attention necessary for an effective mediation. A mediator should withdraw when incapable of remaining impartial or if the mediation is being used to further illegal conduct.

Because the role of a mediator differs from other professional-client relationships, the standards consider the mixing of roles to be problematic. The comments to the standards recommend that lawyer-mediators and other professionals serving as mediators should refrain from offering advice in their areas of concentration. Where appropriate, a mediator may recommend that parties seek outside professional advice. If a mediator, at the request of the parties, does take on an additional role, such

as evaluator of the dispute, the mediator may then assume greater responsibilities and obligations and may be governed in that additional role by other professional standards. For instance, to what extent a lawyer-mediator is subject to the Model Rules of Professional Conduct is unclear, but plainly, if a lawyer-mediator takes on the role of giving legal advice, the model rules are more directly implicated.¹⁶

7. Advertising and solicitation: a mediator shall be truthful in advertising and solicitation for mediation.

The standards state that any communication with the public concerning

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services offered or the expertise of the mediator must be truthful. In addition, mediators must refrain from promises and guarantees of results. A mediator may make reference to meeting state, national, or private organization qualifications if the entity referred to has a procedure for qualifying mediators and the mediator has been duly granted the requisite status. The main point of the comments is that all communications with the public should instill confidence in the process.

8. Fees: a mediator shall fully disclose and explain the basis of compensation, fees, and charges to the parties.

The standards provide that sufficient information about fees should be given at the outset of a mediation to enable the parties to determine if they wish to retain the mediator's ser-

VICES. Fees must be reasonable, which depends on the circumstances of the mediation, and any agreements as to fees should be in writing. The comments to the standards discourage contingent fee arrangements due to the potential for abuses that can diminish confidence in the process. The comments also disfavor referral fees and stipulate that a mediator who withdraws from a mediation should return any unearned fees.

9. Obligations to the mediation process.

The standards regard the improvement of the practice of mediation to be a responsibility of anyone who serves as a mediator. Mediators should use their knowledge of the mediation process to help educate the public about the process, make mediation accessible to those who would like to use it, correct abuses in the system, and improve their mediation skills. One is never so experienced that others cannot provide helpful insights and perspectives.

The Standards of Conduct for Mediators are intended as a starting point in the development of national ethical guidelines for the practice of mediation. It is left to the participants in the field to determine if the standards are appropriate for their use and how they will be applied. The committee hoped that its standards would make a positive contribution to the field of mediation and would serve as a stimulus for further discussion. ☞

¹⁶ Riskin, *Mediation and Lawyers*, 43 OHIO ST. L. J. 29-60 (1982).