TOWARD UNIFORM STANDARDS OF CONDUCT FOR MEDIATORS

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This concept of the attorney as a competitive, cutthroat, argumentative, and often morally bereft warrior-for-hire not only casts a shadow on the profession as a whole, but also fails to allow attorneys to fulfill their potential as active and committed facilitators of the dispute resolution process.1

I. Introduction

It can no longer be doubted that alternative dispute resolution ("ADR") as a substitute for court-based litigation is growing in appeal. The high costs, adversarial nature, and time of traditional litigation have led to the development and popularity of other dispute resolution alternatives. ADR is making substantial inroads into the legal mainstream and is increasingly used in a wide variety of contexts by courts; federal, state, and local governments; businesses and private individuals. According to a recent survey conducted by the National Institute for Dispute Resolution, twenty-eight state courts now have mandatory, non-binding arbitration programs; more than half of the states have formally incorporated ADR methods other than arbitration into their systems through statewide legislation, court rules, or policies; most states offer mediation for divorce, custody, visitation or other family issues on a voluntary or mandatory basis; and virtually every state has experimented with ADR in one or more of its courts.2

At the federal level, eighty out of ninety-four district courts have established some form of ADR program pursuant to the Civil Justice Reform Act of 1990.3 ADR is also utilized in many different areas, including business and commercial disputes, employment disputes, environmental and public policy conflicts, and consumer disputes.

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The different forms of ADR include mediation, conciliation, negotiation, mini-trials, summary jury trials, and early neutral evaluation.\(^4\) This article deals with the process of mediation.

\(^4\) Negotiation occurs when parties agree to meet and discuss a dispute or potential dispute in an attempt to find a solution. Negotiation differs from conciliation in that the parties during negotiation generally act alone to facilitate settlement. Conciliation (sometimes referred to as "assisted negotiation") refers to a process during which a third party encourages negotiation but does not play an active role in resolving the dispute between the parties. A mini-trial is a non-binding process in which parties conduct limited discovery and present their positions to a panel comprised of a neutral and possibly executives of the parties themselves. The panel then discusses with the parties the potential outcome of litigation and engages in settlement discussions with them. "The phrase ‘mini trial’ was coined by a *New York Times* journalist in 1977 to describe successful settlement negotiations in a complex patent infringement case between TRW Inc. and Telecredit, Inc. involving millions of dollars." *Jacqueline M. Nolan-Haley, Alternative Dispute Resolution in a Nutshell* 192 (1992). A summary jury trial is a process during which the parties present summaries of their case to a panel of jurors who then issue an advisory opinion on how they would decide the case, after which settlement discussions are conducted. Early neutral evaluation refers to an attempt to facilitate settlement through a non-binding conference with a neutral who listens to the parties' presentations, asks questions, gives an evaluation, and possibly helps them engage in settlement discussions.


For an explanation of a process which combines mediation with binding arbitration (known as Med-Arb), see generally: *Bette J. Roth et al., The Alternative Dispute Resolution Practice Guide* (1993); Arnold, *supra*; Barry C. Bartel, *Comment, Med-Arb as a Distinct Method of Dispute Resolution: History, Analysis, and Potential*, 27 WIL-
“Mediation is commonly described as a consensual process in which a neutral third party, without any power to impose a resolution, works with the disputing parties to help them reach a mutually acceptable resolution of some or all of the issues in dispute.” As an alternative to the adversarial system, it is less hemmed in by rules of procedure, substantive law, and precedents. The mediator is a facilitator, helping the parties communicate with each other and reach common ground. The role of the mediator is not to judge the matter and make a decision on the merits or to act as an advocate for either party or a particular position.

In recognition of the growth of mediation, the American Arbitration Association ("AAA"), the American Bar Association ("ABA"), and the Society of Professionals in Dispute Resolution ("SPIDR") formed a joint committee in 1992 to develop a code of conduct for dispute mediators. A successful earlier joint effort by the ABA and AAA to develop a guide of ethical rules for arbitrators was a strong impetus for this collaboration. After two years of work, the latest effort culminated in proposed *Model Standards of Conduct for Mediators* ("the Standards").

The purposes of the Standards are multifold: the promotion of integrity and impartiality in mediation, the handling of conflicts and the appearance of conflict of interest, and the treatment of fees in mediation, among others. The Standards encourage facilitative roles by mediators, assisting parties to arrive at voluntary resolutions of their problems. It has been said that the freedom of parties to reach the best solution on which they can agree must be preserved, and that mediation is a type of cooperation between parties and "not a combat

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6. Id. at 2.


8. The joint committee consisted of David A. Botwinik, Esq. and myself, for the American Arbitration Association; Dean James J. Alfini 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. I served as chair of the committee. See Appendix A, infra, for the text of the *Model Standards of Conduct for Mediators*. 
to be won.”9 The Standards are intended to invite comment, to increase consciousness of ethical issues in mediation, and to be adopted and tailored by different groups, as they feel appropriate. Further, the goal of the Standards is to encourage mediation of a high quality without drawing a distinction between the lawyer-mediator and other professional mediators.

In developing the Standards, the joint committee drew on a number of existing codes of ethics for neutrals, particularly codes developed in states such as Florida,10 Hawaii,11 Texas,12 Colorado,13 and Oregon.14 Additionally, ethical codes for mediators and arbitrators developed by various organizations were reviewed in drafting the Standards, namely from the following: American Arbitration Association/American Bar Association;15 American Arbitration Association and National Academy of Arbitrators and Federal Mediation and Conciliation Service;16 American Bar Association Center for Professional Responsibility;17 American Bar Association;18 Society of Professionals in Dispute Resolution;19 Academy of Family Mediators;20

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10. FLA. SUP. CT. STANDING COMM. ON MEDIATION & ARBITRATION RULES, STANDARDS OF PROFESSIONAL CONDUCT FOR CERTIFIED AND COURT-APPOINTED MEDIATORS [hereinafter FLA. STDS.].
11. HAW. STATE JUD., PROGRAM ON ALTERNATIVE DISPUTE RESOLUTION (1986), STANDARDS FOR PRIVATE AND PUBLIC MEDIATORS IN THE STATE OF HAWAI, [hereinafter HAW. STDS.].
14. OREGON MEDIATION ASS’N., STANDARDS OF MEDIATION PRACTICE [hereinafter OR. STDS.].
15. AAA/ABA-ACD, supra note 7.
18. TASK FORCE ON MEDIATION, AMERICAN BAR ASSOCIATION, DIVORCE AND FAMILY MEDIATION: STANDARDS OF PRACTICE (1986) [hereinafter ABA STANDARDS FOR FAMILY MEDIATORS].
19. SPIDR, ETHICAL STANDARDS OF PROFESSIONAL RESPONSIBILITY (Supp. 1995) [hereinafter SPIDR].
20. ACADEMY OF FAMILY MEDIATORS, STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION [hereinafter AFM].
Association of Family and Conciliation Courts;21 and Center for Dispute Settlement at the Institute of Judicial Administration.22

The Standards are divided into nine sections and cover a broad range of topics: Self-Determination; Impartiality; Conflicts of Interest; Competence; Confidentiality; Quality of the Process; Advertisements and Solicitation; Fees; and Obligations to the Mediation Process. Each Standard states a broad principle so as to encompass varying situations and includes descriptive comments, stated both generally and specifically. This Article offers an overview of each proposed Standard along with a general discussion of the subject areas and references to various ethical codes and cases in point.

II. SELF-DETERMINATION: A MEDIATOR SHALL RECOGNIZE THAT MEDIATION IS BASED ON THE PRINCIPLE OF SELF-DETERMINATION BY THE PARTIES

The joint committee was unanimous in its view that self-determination is the most fundamental principle of mediation. As one distinguished scholar has noted, mediation “substitutes a negotiation structure that does not require unnecessary compromise but permits the parties to come to [an] agreement without having to give up their preferences.”23

Inherent in the principle of self-determination is a role for the mediator of encouraging disputants “to find a mutually agreeable settlement by helping [the parties] to sharpen the issues, reduce misunderstandings, establish priorities, vent emotions, find points of agreement, and ultimately, negotiate an agreement.”24 Since mediators cannot legally bind parties to mediation agreements, the parties retain control of the process.25 The parties must be given the opportunity to consider proposed options and to accept or reject them.26 Self-determination does not require that mediators personally

21. ASSOCIATION OF FAMILY AND CONCILIATION COURTS, MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION [hereinafter AFCC].
22. CENTER FOR DISPUTE SETTLEMENT AT THE INSTITUTE OF JUDICIAL ADMINISTRATION, STANDARDS FOR COURT-CONNECTED MEDIATION PROGRAMS [hereinafter CDS-1JA].
26. See DALLAS STDS., supra note 12 (providing that a “mediator shall not advocate a particular solution but should present all options in their best and worst light”).
ensure that each party makes a fully informed choice in reaching a particular agreement, but it does place on mediators a responsibility for making sure that the parties are aware of the importance of making informed decisions and consulting other professionals, if necessary.

The potential for one party taking unfair advantage over another exists in mediations as in other processes. It may take a great deal of sensitivity, prudence and skill on the part of the mediator to prevent any such unfair advantage from dominating attempts to reach a solution. The mediation process relies upon the ability of the parties to reach a voluntary or uncoerced agreement.

It is understood that parties may withdraw from mediation at any time. The mediator will attempt to work within the boundaries set by the desires of the parties, and manage power to maintain a fair process.

III. Impartiality: A Mediator Shall Conduct the Mediation in an Impartial Manner

The concept of mediator impartiality is also central to the mediation process. The Standards speak strongly on this subject. If, at any time, the mediator is unable to conduct the process in an impartial

27. See SPIDR, supra note 19, § 6 (stating that a neutral has no vested interest in terms of the settlement but must be satisfied that agreements will not impugn the integrity of the process).

28. Id. (stating that dispute resolution belongs to the parties); AFCC, supra note 21 (stating that the mediator shall not coerce or make decisions for any party).

29. See HAW. STDS., supra note 11, § X(2) stating: A mediator shall inform the participants of their right to withdraw from the mediation at any time and for any reason. If a mediator believes that the participants are unable to participate meaningfully in the process or that a reasonable agreement is unlikely, a mediator may suspend or terminate mediation and encourage the parties to seek other forms of assistance for the resolution of their dispute. If participants reach a final impasse, a mediator should not prolong unproductive discussions that would result in emotional or monetary costs to the participants. Id.

It should be noted that some state statutes make a distinction between requiring parties to attend an initial, education-type session of a mediation hearing from which they may generally not be able to withdraw, and withdrawing thereafter if they so choose. Id.

30. See HAW. STDS., supra note 11, § I(1) stating: The primary responsibility for the resolution of a dispute rests with the parties. The mediator's obligation is to assist the disputants in reaching an informed and voluntary settlement. At no time and in no way shall a mediator coerce any party into agreements or make substantive decisions for any party. Mediators make suggestions and may draft proposals for the parties' consideration, but all decisions are to be made voluntarily by the parties themselves. Id.
manner, the Standards obligate the mediator to withdraw. Implicit in this Standard is the mediator's duty to avoid conduct that is partial or gives the appearance of partiality toward one of the parties. The Standards caution mediators against showing favoritism or bias or being an advocate for one of the parties. Essentially, a mediator shall mediate only those matters in which the mediator can remain impartial and evenhanded. It is common knowledge that a mediator's relationship with one or more of the parties can compromise impartiality.

A subject that sometimes arises during mediation is the issue of power imbalance. This can take different forms, for instance, where only one party is represented by counsel or a disparity of power exists

31. See Commonwealth Coatings Corp. v. Continental Cas. Co., 393 U.S. 145, 150 (1968) (holding that subcontractor was entitled to have an arbitration award set aside because any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias). But see Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co., 991 F.2d 141, 146 (4th Cir. 1993) (holding that mere appearance of bias is insufficient to demonstrate "evident partiality"); Health Servs. Mgmt. Corp. v. Hughes, 975 F.2d 1253, 1264 (7th Cir. 1992) (finding that prior business relationships between prevailing party and two of the three arbitrators on panel were in and of themselves insufficient to vacate an award absent timely objection by losing party to disqualify arbitrators).

32. See, e.g., Al-Harbi v. Citibank, N.A., 85 F.3d 680 (D.C. Cir. 1996). One of the issues was whether a motion to vacate an arbitration award should be granted on the grounds of alleged "evident partiality" of the arbitrator due to nondisclosure of the arbitrator's former law firm's representation of one of the disputants on related matters. Id. at 682-83. The court held that "the burden on a claimant for vacation of an arbitration award due to 'evident partiality' is heavy, and the claimant must establish specific facts that indicate improper motives on the part of arbitrator." Id. at 683 (citing Peoples Sec. Life Ins. Co., 991 F.2d at 146). The fact that an arbitrator had not conducted an investigation sufficient to uncover existence of facts marginally disclosable under Commonwealth Coatings is not sufficient to warrant vacating an arbitration award for evident partiality. Id. The court explicitly held that there is no duty on an arbitrator to make any such investigation. Id.; see also Heelan v. Lockwood, 533 N.Y.S.2d 560, 562 (1988) (holding that where the lawyer-mediator consulted with plaintiffs before negotiations had begun between the parties, the appearance of impropriety necessitated withdrawal by the mediator, without reference to any code of ethics).


34. See Model Rules of Professional Conduct Rules 2.2, 2.3 (1995) (stating that lawyer must reasonably believe that a common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients); ABA Divorce and Family Mediation Standards, supra note 18, Standard III (stating that a mediator must be impartial as between parties); AFM, supra note 20 (stating that a mediator is obligated to maintain freedom from bias in word or action, and a commitment to aid all participants, as opposed to one individual, in reaching a satisfactory agreement); AFCC, supra note 21 (stating that a mediator must remain free from favoritism and bias in word and in action); CDS-IJA, supra note 22 (requiring freedom from bias by appearance, word, or action, and a commitment to serve all parties).
between the parties. The Standards are premised on the belief that in order to have an appropriate self-determined process, the parties must have the requisite physical and mental capacity to engage in a process of dispute resolution. In a situation where there may be a gross disparity of power or a disparity in terms of knowledge, the mediator may have to terminate the mediation if the mediator is unable to provide assistance to deal appropriately with the power imbalance or to counter the imbalance in a way that does not compromise the mediator's impartiality. Similarly, where the mediator discovers a party has lied or acted fraudulently during the mediation, the mediator may be required to cease the mediation. In a situation where it is clear that one party is overwhelming the other, the mediator can conduct the mediation through private caucuses and shuttle diplomacy as a mechanism for trying to deal with an obvious disparity. In particular settings where one party has a better case than the other, the mediator should not try to balance the playing field in order to produce a result that the mediator believes is fair. The mediator could, in effect, be producing an unfair process. A mediator can work with the parties by facilitating the process through information gathering, exploring the different interests that might be involved, and raising questions about the reliability of the stronger party's position. The Standards encourage a mediator to engage in a certain amount of reality checking during the mediation process. This may serve to counterbalance any power imbalances that are initially manifested. But, in the final analysis, a mediator should not lose sight of the fact that mediation is a process of self-determination by the parties, an effort to see if they can find common ground.

As noted earlier, the role of the mediator is different from that of a judge or arbitrator. A mediator, in a sense, is an "advocate" for party-agreement, as well as for the integrity of the process, and does not make binding decisions of fact or law based on the merits of the case. Although the integrity of the mediation process is dependent

35. See Feerick et al., supra note 33, at 110. For example, if one party is aware of an applicable statute of limitations and is pushing ahead for money that the party in reality is not entitled to, the gross disparity of knowledge may be a basis for the lawyer-mediator to terminate the mediation.

36. See Feerick et al., supra note 33, at 114.

37. See Robert A. Baruch Bush & Joseph D. Folger, The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition 28-31 (1994) (suggesting that personal transformation of the parties is a goal of mediation). Professor Bush's works on ethics in mediation were helpful to the Committee. See also Bush, supra note 5 and accompanying text; Robert A. Baruch Bush, Efficiency and Protection, or
on the ability of the mediator to be neutral, some situations may require the mediator to act.\textsuperscript{38}

A final note about \textit{Standard III}: It suggests that when parties to the mediation ask for the mediator's advice on what they should do, the mediator should not advise or counsel them as part of the mediation since the \textit{Standards} promote a facilitative and not an evaluative role for mediators. The \textit{Standards} encourage mediators to make clear to the parties the importance of consulting other professionals. If parties request the involvement of other professionals, mediators should accommodate that request.\textsuperscript{39} Lastly, this \textit{Standard} serves to caution mediators against condoning, facilitating or collaborating\textsuperscript{40} with any form of discrimination.\textsuperscript{41}

\textbf{IV. 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 basic approach of the \textit{Standards} to questions of conflicts of interest is consistent with the concept of self-determination. The mediator has the responsibility to disclose all actual and potential conflicts that are reasonably known to the mediator and could reasonably be seen as raising a question about neutrality for the mediation. Specifically, the mediator should disclose a current or past personal or professional relationship with any party or lawyer involved in the mediation, or any direct or indirect financial or personal interest in the outcome of the mediation.

The \textit{Standards} speak of mediators disclosing conflicts of interest that are "reasonably known" to them. The joint committee stopped

\begin{itemize}
\item \textsuperscript{38} See \textit{Empowerment and Recognition?: The Mediator's Role and Ethical Standards in Mediation}, 41 U. FLA. L. REV. 253 (1989) (discussing the mediator's proper role).
\item \textsuperscript{39} See \textit{ABA Standards for Mediators} § V(c) (noting that the mediator has a duty to assure a balanced dialogue and must attempt to diffuse any manipulative or intimidating negotiation techniques); FLA. STDS., \textit{supra} note 10, § V(A)(1) (requiring mediators to disclose "any circumstances bearing on possible bias, prejudice or impartiality").
\item \textsuperscript{40} See \textit{Dallas STDS.}, \textit{supra} note 12, § II(A)(5) ("the mediator shall not collude with one party for personal or corporate gain").
\item \textsuperscript{41} The comments to the \textit{Standards} state that "a mediator should guard against partiality or prejudice based on the parties' personal characteristics, background or performance at the mediation."
\end{itemize}
short of applying a stricter standard because of the difficulty, if not impossibility, of checking for conflicts of interest in every situation, especially in multi-door court mediations in which mediators serve on a pro bono basis. Under the Standards, if all parties agree to mediate after being informed of conflicts, the mediator may proceed with the mediation. If, however, the conflict of interest is so severe that it casts serious doubt on the integrity of the process, the mediator should decline to proceed.\(^42\) An example of this might be a person who was intimately associated with one of the parties to the mediation for a long period of time prior to mediating a dispute between that party and another party. Such a situation makes it difficult to be fair inasmuch as one might be tempted either to favor one's friend or to go to great lengths not to favor the friend.

Under the Standards, a mediator's duty to disclose relevant information to the parties is a continuing obligation throughout the process and also extends to conduct occurring after the mediation has taken place. The fact of a full disclosure at the beginning of the mediation does not obviate the need for a disclosure of relationships that might arise during the course of the mediation. Moreover, a subsequent relationship with one of the parties to the mediation raises an issue of conflict of interest and a possible violation of the confidentiality of the mediation. Another reason for limiting a subsequent representation is that it could raise a question about whether a mediator acted during the mediation to gain future employment, thereby undermining the integrity of the process and possibly the mediation settlement itself.

Without the consent of all parties, the Standards provide that a mediator should not subsequently become the representative for one of the parties in a related matter,\(^43\) or in an unrelated matter under

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42. See AFCC, supra note 21, § II(B)(1) & (2) (containing three responses to conflict: (i) abstention, (ii) withdrawal, and (iii) disclosure); ABA Standards for Family Mediators, supra note 18, § III(A) (taking a strong position against attorneys acting as mediators for former clients). However, commentators of III(A) argue that the provision is too broad and mediators may be biased from past relationships with the parties, so the mediator must reveal such relationships and let the parties decide if they want to keep the mediator; SPIDR, supra note 19, § 4 (stating that the "duty to disclose is a continuing obligation throughout the process"); FLA. STDS., supra note 10, § V(B)(1) & (2) (focusing on disclosure as the mechanism for checking conflicts of interest and requiring disclosure to the court); DALLAS STDS., supra note 12, § II(9)(c) (stating that a mediator should withdraw if the mediator "believes or perceives that there is a clear conflict of interest . . . irrespective of the expressed desire of the parties"). Note that the FLA. STDS. is similar to the DALLAS STDS. See FLA. STDS., supra note 10, § V(B)(3).

43. A federal court in Utah addressed this very issue in Poly Software Int'l Inc. v. Yu Su, 880 F. Supp. 1487 (D. Utah 1995). The court applied a state attorney conduct rule that prohibited subsequent representation by a lawyer mediator on a "substantially factually
circumstances which would raise legitimate questions about the integrity of the mediation process.\textsuperscript{44} A subsequent representation in a "related matter" is troublesome on a number of counts. It runs the risk of violating the confidentiality of the mediation; creates an appearance of conflict of interest; undermines confidence in the fairness of the mediation; and puts the mediation agreement in jeopardy. A subsequent representation in an "unrelated matter," while less objectionable, could nonetheless serve to undermine confidence in the mediation depending on the circumstances of the mediation and the time that has elapsed since the mediation. The joint committee therefore sought to raise a note of caution about a subsequent representation in an unrelated matter.

As for a mediator subsequently serving in an adversarial role with respect to a party in a prior mediation, it should make no difference whether the matter is related or unrelated. Such a role in either kind of matter should be discouraged since the mediator undoubtedly possesses private information concerning the attitudes and approaches of a party from the mediation experience. To permit an adversarial relationship in a subsequent matter would curtail the disputants' freedom to confide during a mediation—"this would destroy a mediator's efficacy as an impartial broker."\textsuperscript{45}

\textsuperscript{44} See also Cho v. Superior Court, 45 Cal. Rptr. 2d. 863, 865 (Ct. App. 1995) (dealing with whether a law firm must be disqualified when it employs a former judge who in his official capacity received ex parte confidences bearing on the merits of the lawsuit over which he was presiding from an adverse party in the identical litigation in which the motion to disqualify was brought). The court held that the firm must be disqualified and looked at the public policy considerations involved: if parties to a mediation know that their mediator could someday be an attorney on the opposite side in a substantially related matter, they will be discouraged from freely disclosing their position in mediation, which may severely diminish the opportunity for settlement. \textit{Id.} at 869–70. See generally Poly Software, 880 F. Supp. at 1490.

As the *Standards* were not written with an eye to being used as "legal" standards, but rather as helpful guides for mediators, they do not deal with whether a violation of a particular standard should subject a mediator to liability. In regard to the subject of liability, in one leading case a mediator was found not liable for damages for alleged negligence because of the failure to establish any damages proximately caused by such negligence.\(^{46}\) To establish liability, a claimant must show a duty owed by the mediator, a breach of that duty through failure to comply with accepted standards of practice, money damages, and a causal connection between the failure to meet accepted standards of practice and the alleged damages.\(^{47}\)

V. **COMPETENCE: A MEDIATOR SHALL MEDIATE ONLY WHEN THE MEDIATOR HAS THE NECESSARY QUALIFICATIONS TO SATISFY THE REASONABLE EXPECTATIONS OF THE PARTIES**

The *Standards* do not distinguish between lawyer-mediators and other professional mediators in regard to the competence necessary to oversee the mediation process. Persons who offer themselves as mediators lead parties and the public to believe that they have the competency to mediate effectively. Under the *Standards*, any person may be selected as a mediator provided the parties are satisfied with the mediator's qualifications. The joint committee did not agree with the view expressed of requiring mediators to have expertise in the area they are mediating. It took note of the fact that sometimes parties may not want that, believing that such experience may contribute to a predisposition with respect to the subject of the dispute. Instead, the *Standards* provide that a mediator should have the necessary qualifications to satisfy the reasonable expectations of the parties. The theory behind this *Standard* is the joint committee's belief in the principle of self-determination and therefore the importance of respecting the parties' choice of a mediator. In some cases, however, such as complex civil cases, a law degree or other experience related to the subject matter of the case may lend credibility to a mediator for cer-

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\(^{46}\) In *Lange v. Marshall*, 622 S.W.2d 237 (Mo. Ct. App. 1981), an attorney undertook the mediation of a divorce settlement for two of his friends. *Id.* at 239. The court declined to enter judgment on the settlement when one of the parties had second thoughts and sought legal representation. *Id.* Subsequently, a new settlement was reached between the parties. *Id.* at 238.

tain parties. Some organizations have developed a list of mediator skills necessary for competent performance as a neutral and for mediation, and some jurisdictions require mediators to have a particular educational background or professional standing. No degree, however, can ensure competent performance in dealing with a dispute of the parties.

Training and education in mediation, even for the most competent and knowledgeable professionals, is often necessary to mediate effectively. The Standards suggest that mediators have available for parties information regarding their relevant training, education and experience so that the parties will be fully informed.

VI. CONFIDENTIALITY: A MEDIATOR SHALL MAINTAIN THE REASONABLE EXPECTATIONS OF THE PARTIES WITH REGARD TO CONFIDENTIALITY

Confidentiality is another vital ingredient of mediation providing “a sense of trust that is necessary to the workings of a mediation proceeding.” The privacy of mediation is one of the features that makes it so useful for exploring possibilities of settlement, since potentially sensitive information can be freely discussed. As a rule, communications occurring during a mediation, like confidences from a client to a lawyer or a patient to a doctor, are confidential and may

48. A report to the National College of Juvenile and Family Law suggests that mediators in family and juvenile courts must have not only the necessary process skills, but also an understanding of juvenile and family law and the concepts of child development. NATIONAL COLLEGE OF JUVENILE AND FAMILY, LAW COURT APPROVED ALTERNATIVE DISPUTE RESOLUTION: A BETTER WAY TO RESOLVE MINOR DELINQUENCY 65-66 (1989).

49. See SPIDR, supra note 19, § IV; MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1995) (Competence: “A lawyer shall provide competent representation for a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”).

50. “Effective mediation requires candor. Mediators must be able to draw out baseline positions and interests which could be impossible if the parties were consistently looking over their shoulders. . . . Fairness to disputants requires confidentiality.” Joshua P. Rosenberg, Keeping the Lid on Confidentiality: Mediation Privilege and Conflict of Laws, 10 Ohio St. J. on Disp. Resol. 157, 158-59 (1994) (citing LAWRENCE FREEDMAN et. al., CONFIDENTIALITY IN MEDIATION: A PRACTITIONER’S GUIDE 205 (1985)).

51. See Rosenberg, supra note 50, at 163 (citing N.Y. Jud. Law § 849-b(6) (McKinney 1992) (stating that mediation requires an atmosphere free from “restraint and intimidation”)); see also Pipefitters Local 208 v. Mechanical Contractors Ass’n, 104 L.R.R.M. (BNA) 3036, 1980 WL 2169, at *7 (D. Colo. 1980) (granting motion to quash subpoena which directed a federal mediator to appear for a deposition because of the importance of confidentiality in the mediation process). The court was influenced by the rules of the Federal Mediation and Conciliation Service. Id.
not be revealed by the mediator to a party outside the mediation.\textsuperscript{52} As one commentator has noted: "[c]lients view confidentiality as a hallmark of mediation and are often given the impression that the events of a mediation proceeding will be confidential and hence immune from being used in later proceedings."\textsuperscript{53} The parties' expectations of confidentiality depend on the circumstances of the mediation and any agreements they may make.\textsuperscript{54} The \textit{Standards} require a mediator to meet both sides "reasonable expectations" of confidentiality. Since the parties may come to agreement on their own rules of confidentiality, it is good practice for a mediator to discuss at the outset of a mediation their expectations with respect to confidentiality and to come to consensus with respect to these expectations.

The law on the subject of confidentiality is not settled.\textsuperscript{55} Problems exist within states that have a statute for the confidential

\textsuperscript{52} See generally Haw. STDS., supra note 11, § V(3) (requiring the mediator to "preserve and maintain the confidentiality of all mediation proceedings"). The \textit{Hawaiian Standards} also include provisions for ensuring the confidentiality of any records, addressing release of records, and addressing records or transcripts of mediation proceedings or conferences. \textit{Id.} at §§ V(2),(3). See Tex. STDS., supra note 12, § 8 (stating that a "mediator should not reveal any confidential information made available in the mediation process, which information is privileged and confidential, unless the affected parties agree otherwise or as may be required by law"); Fla. STDS., supra note 10, § VI(B) (requiring that the "mediator shall maintain confidentiality in the storage and disposal of records \\ldots\ldots"); CDS- IJA, supra note 22 (all information is confidential unless: (1) statutorily or judicially mandated reporting; (2) in the judgment of mediator, reveals serious danger of serious physical harm; (3) parties agree to disclose; (4) mediator has to inform parties information is not protected); SPIEDR, supra note 19, § 3 ("Mediator must resist all attempts to cause him to reveal any information outside the process, except in situations when confidentiality is not protected. \\ldots\ldots Mediator shall not testify regarding the dispute unless required by law."). However, the standard provides no explanation of what type of case might not allow confidentiality to be maintained. See AFCC, supra note 21, § IV(A) 1–3 (requiring mediators to explain to the parties all exceptions to the promise of confidentiality).

\textsuperscript{53} Rosenberg, supra note 50, at 162 (citing Lawrence Freedman \textit{et al.}, Confidentiality in Mediation: A Practitioner's Guide 205 (1985)); see also National Airlines v. Air Line Pilots Ass'n, 92 L.R.R.M (BNA) 3600, 1996 WL 1537, at *1 (D.D.C. 1976) (holding that "[d]isclosure of information obtained by Federal Mediators in the course of their duties cannot be extracted in disputes between private parties except under the most unusual and compelling circumstances"). No code was relied upon.

\textsuperscript{54} Note, however, that each party may have a different expectation of privacy. A question that arises is whether there should be a contractual approach to confidentiality. Some commentators suggest that total confidentiality should not be a mediation requirement made by the mediator, but the terms of the confidentiality should be made in writing, and be agreed to and signed by the parties and the mediator. See Arnold, supra note 9, at 730.

\textsuperscript{55} For example, the privilege of confidentiality in different state rules, statutes, and codes is defined in many ways and varies in regard to an absolute or qualified privilege of confidentiality. See Rosenberg, supra note 50, at 158 (citing N.Y. Jud. Law § 849-b(6) (McKinney 1993)) ("prohibiting disclosure of 'any matters discussed' in mediation"); Colo. Rev. Stat. Ann. § 13-12-307 (West 1993).
privilege of mediation, such as failing to state who may utilize the privilege\textsuperscript{56} or how such privileges are to be applied.\textsuperscript{57} Generally, a mediator should not disclose any matter that a party expects to be confidential unless given permission by all parties or unless required by law or public policy.\textsuperscript{58} However, the reality is that given current law a mediator may not always be able to keep the mediation proceedings confidential.\textsuperscript{59} For example, some codes of ethics require that mediators hold all information confidential except if it is related to past or present physical harm of an individual.\textsuperscript{60} Another code obligates mediators to resist disclosure of confidential material, but provides for exceptions when the information relates to abuse or when the mediator is required to provide court testimony.\textsuperscript{61} The commercial mediation rules promulgated by the AAA, on the other hand, provide no exceptions, and further state that the mediator "shall not be compelled to divulge" records or "to testify in regard to the mediation in any adversary proceeding or judicial forum."\textsuperscript{62} Currently, there is a split in thought as to the need for an explicit privilege of confidentiality.\textsuperscript{63} Confusion as to the limits of mediator confidential-

\textsuperscript{56} See Rosenberg, supra note 50, at 159.

\textsuperscript{57} See id. at 160; see, e.g., In re Waller, 573 A.2d 780, 781 (D.C. 1990) (approving a decision of the Board of Professional Responsibility). The court stated that the confidentiality requirement of a trial court's civil mediation order was not intended to preclude a disclosure by the mediator to the judge of a possible conflict of interest by one of the attorneys. Id.

\textsuperscript{58} See Bernard v. Galen Group, Inc., 901 F. Supp. 778, 780 (S.D.N.Y. 1995) (holding that an attorney violated confidentiality provisions by writing to the court a letter disclosing terms, including specific dollar amounts, of settlement offers made during the mediation process). The parties' confidentiality was violated by attorney regardless of whether he genuinely believed that he needed to set the record straight. Id. at 783.

\textsuperscript{59} Rosenberg, supra note 50, at 163; (citing Lawrence Freedman, Confidentiality: A Closer Look, ABA Special Comm. on Dispute Resolution, of the Pub. Servs. Div., Alternative Dispute Resolution: Mediation and the Law 68, 72 (1983)).

\textsuperscript{60} See Dallas Stds., supra note 12 (including an exception to confidentiality when, in the judgment of the mediator, there is a physical threat to a party or evidence of child abuse); Tex. Disp. Resol. Stds., supra note 12, § I(A)(7), (8) (containing an additional exception to confidentiality in regard to unethical behavior of other mediators).

\textsuperscript{61} See Colo. Stds., supra note 13, at 119.


\textsuperscript{63} See Kevin Gibson, Confidentiality in Mediation: A Moral Reassessment, 1992 J. Disp. Resol. 25, 43 (discussing some of the potential problems of a mediation privilege including: unfairness, an aura of suspicion, concealment of criminal acts, and general harm to third parties); "[A] specific exception to a general confidential privilege allowing for evaluation of progress would help alleviate any aura of suspicion about privileged mediation. Exceptions mandating use of confidential information on actions against the mediation would assure redress against abuses of the process." Id.
ity may be serious enough that it places mediation progress in jeopardy.  

In states that do not have a specific statute defining the limits and boundaries of the confidentiality privilege, courts usually balance the benefit of keeping confidentiality against its potential harm. The issue, however, is that mediators and parties in such states cannot anticipate or rely on a consistent application of confidentiality. Therefore, a uniform standard with regard to a privilege of confidentiality would greatly benefit parties, mediators, and the courts.

VII. 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

A mediator must try to ensure a quality process in order for a mediation to be perceived as effective. This requires a commitment to diligence and procedural fairness and an adequate opportunity for each party in the mediation to participate in the discussions. The mediator also has a responsibility to ensure that agreements made during the mediation are the parties'—voluntary and uncoerced. Implicit is the responsibility to suspend or terminate a mediation if the process harms one or more of the participants.

64. Id. (citing SPIIDR, ETHICAL STANDARDS OF PROFESSIONAL RESPONSIBILITY § 3 (1986)). “If participants in a mediation proceeding do not feel that their communications will be held confidential, then clients will tend not to divulge information. A sense of trust and informality is paramount to mediation proceedings. If these elements are lacking from a mediation proceeding, then there will be a breakdown in the system.” Rosenberg, supra note 50, at 181.

65. One such test is the four prong “Wigmore Test,” which states that: (1) communications must originate in confidence so that they will not be disclosed to others; (2) the preservation of secrecy must be essential to the success of the relationship; (3) the relationship is one which the public ought to foster and protect; and (4) the injury from disclosure must be greater than the benefit to be gained by the public from non-disclosure. 8 JOHN H. WIGMORE, WIGMORE ON EVIDENCE § 2285 (John T. McNaughton rev. 1961).


67. See Gibson, supra note 63, at 44; Rosenberg, supra note 50, at 160-63.

68. See Gibson, supra note 63, at 54-55.

69. Mediation is a process in which “the emphasis is not on who is right or wrong . . . but rather upon establishing a workable solution that meets the participant's party's unique needs.” JAY FOLBERG & ALISON TAYLOR, MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION 10 (1984).

70. See SPIIDR, supra note 20, § 5 (suggesting mediators to terminate the mediation “when incapable of serving or when unable to remain impartial” and also recommending that parties seek outside counsel); HAW. STDS., supra note 11, § VI(2) (requiring the mediator to withdraw if he or she believes those interests are not being served); DALLAS STDS., supra note 12, § II(A)(3) (providing that a “mediator shall question the appropriateness of
An issue that is raised more frequently is the question of whether mediation is the practice of law.\footnote{71} The issue comes into sharper focus when a mediator is called upon to render evaluations and provide the parties with a sense of what the "likely outcome" will be or to make substantive findings and conclusions. In drafting the Standards, the joint committee considered whether mediation is the practice of law but did not view it as necessary of resolution in terms of its work. The committee proceeded on the premise that mediation is based on the self-determination of the parties and that mediators should be effective facilitators and not necessarily evaluators.\footnote{72} However, the committee was aware that evaluations were going on in the field\footnote{73} and therefore the Standards do not prohibit mediators from taking on an evaluative role per se in a mediation. Note, however, that if mediators undertake additional dispute resolution roles, they may assume increased responsibilities and obligations and other standards might also be applicable.\footnote{74} For example, a mediator who provides advice and

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\footnote{71}{Private mediation of legal disputes outside litigation can affect important legal rights. A party cannot evaluate the fairness of an option without minimally adequate information about the law. Mediation that does not assure each party has such information is likely to reinforce existing disparities in knowledge, resources and power. Unauthorized practice rules prohibit non-lawyers from giving legal advice and drafting legal documents. Therein lies the dilemma. The mediation process must accommodate the parties' need for information with the mediator's limited ability to give complete and accurate information. Judith L. Maute, Public Values and Private Justice: A Case for Mediator Accountability, 4 Geo. J. LEGAL ETHICS 503, 519–20 (1991).}

\footnote{72}{Dean James Alfini, a member of the committee, stated that lawyer-mediators should be prohibited from offering legal advice or evaluations. Laura Duncan, Ethics Standards for Mediation Field Taking Shape, CHI. DAILY L. BULL., Mar. 30, 1994 at 1.}

\footnote{73}{See Leonard L. Riskin, Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed, 1 HARV. NEGOTIATION L. REV. 7, 17 (1996) (describing two ranges of mediation behavior: those who evaluate and those who facilitate); see also Kimberlee K. Kovach \& Lela P. Love, "Evaluative" Mediation is an Oxymoron, 14 ALTERNATIVES TO THE HIGH COST OF LITIG. 31 (1996) (stating that evaluative mediation jeopardizes neutrality); John Bickerman, Evaluative Mediator Responds, 14 ALTERNATIVES TO THE HIGH COST OF LITIG. 70 (1996) (stating that evaluative mediation forces the participants to reevaluate their positions).}

\footnote{74}{See Standards of Conduct for Mediators, at App. infra, p. 480 providing that: The primary purpose of a mediator is to facilitate the parties voluntary agreement. 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 must 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 consider resolving their dispute through arbitration, counseling, neutral evaluation, or other processes. A mediator who undertakes, at the request of the}
makes judgments may have responsibilities under the professional code of ethics and state unauthorized practice of law statutes and rules.\textsuperscript{75} This subject has spawned a good deal of discussion which is not treated in this article because of the emphasis of the Standards on mediation as a facilitative process.\textsuperscript{76}

Generally speaking, there is less problem with an evaluative role by a mediator where parties are represented by counsel because some of the dangers are minimized by the legal representation present. However, when the parties are not represented and the mediator takes on an active role by providing professional advice and an evaluation, there may be a loss of neutrality in the process, and even possibly a violation of a state unauthorized practice of law statute or rule.\textsuperscript{77} This area is one in need of more discussion and possible clarification, and Professor Carrie Menkel-Meadow’s article in this volume provides a thoughtful explanation of this subject.\textsuperscript{78}

\begin{itemize}
\item 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.
\item The issue involving a nonlawyer as an evaluative mediator can be compared to states which allow certain judges to be nonlawyers. See N.Y. Const. art. 6, § 20 (c), which states in part:
\item Qualifications for and restrictions upon the judges of district, town, village or city courts outside the city of New York, [except as provided elsewhere], shall be prescribed by the legislature, provided, however, that the legislature shall require a course of training and education to be completed by justices . . . who have not been admitted to the practice of law in this state.
\item Note that Rule 2.2 of the ABA Model Rules does not necessarily regulate lawyers serving as mediators, but those serving as “intermediaries”.
\item See Bush & Folger, supra note 37, at 16; Kimberlee K. Kovach, Mediation: Principles and Practice 210–15 (1994); Nancy H. Rogers & Craig A. McEwen, Mediation Law, Policy & Practice § 10 (2d ed. 1994); Carrie Menkel-Meadow, Toward Another View of Legal Negotiation: The Structure of Problem Solving, 31 UCLA L. Rev. 754, 758 (1983); see also Carrie Menkel-Meadow, Is Mediation the Practice of Law?, 14 Alternatives to the High Cost of Litig. 57, 59 (1996) (discussing mediation as a facilitative process); Bruce E. Meyerson, Lawyers Who Mediate Are Not Practicing Law, 14 Alternatives to the High Cost of Litig. 74, 75 (1996) (stating that mediation should not be characterized as the practice of law); Geoffrey C. Hazard, Jr., When ADR Is Ancillary to a Legal Practice, Law Firms Must Confront Conflicts Issues, 12 Alternatives to the High Cost of Litig. 147, 149 (1994) (discussing mediation as an “ancillary business” with ethical considerations).
\item See Rogers & McEwen, supra note 76, § 10.05.
\item Carrie Menkel-Meadow, Ethics in Alternative Dispute Resolution: New Issues, No Answers From the Adversary Conception of Lawyers’ Responsibilities, 38 S. Tex. L. Rev. 405 (1997).
\end{itemize}
VIII. ADVERTISING AND SOLICITATION: A MEDIATOR SHALL BE TRUTHFUL IN ADVERTISING AND SOLICITATION FOR MEDIATION

In 1990, the Supreme Court found that states cannot prohibit advertisements of specialization certificates when issued by bona fide organizations based on rigorous procedures. However, certain forms of advertising have been disapproved in bar ethics opinions.

Under the Standards, advertising or other communication with the public regarding services offered or the education, training, and expertise of the mediator must be truthful. The basic purpose of the committee in formulating Standard VII was to deal with mediator advertisements that made misleading claims of success. The joint committee was of the view that mediators should refrain from promises and guarantees of results, because the mediation process is premised on the self-determination of the parties and such claims lull parties into a false sense of security.

79. Peel v. Attorney Registration & Disciplinary Comm’n of Ill., 496 U.S. 91, 110-11 (1990) (ruling on the permissibility of listing “Certified Civil Trial Specialist” on a letterhead). However, this rationale, based on the First Amendment, would probably also extend to truthful and non-misleading representations about mediation certifications. See also Minn. State Bar Ass’n 114, supra note 43, Rule 114 (stating that in an advertisement or other communications to the public, a neutral who is on the Supreme Court Roster may only use the phrase “qualified neutral under Rule 114 of the Minnesota General Rules of Practice”).

80. See Oregon Bar Ass’n Formal Op. 101 (1991) (approving the use in a letterhead of the trade name “Family Mediation Center,” but only if the lawyers’ names were also listed to avoid confusion about who would have responsibility for legal services). See also Mass. Bar Ass’n on Professional Ethics Op. No. 85-3 (1983). The prime danger of the trade name is that it might deceptively suggest a partnership with a nonlawyer who used the letterhead.

81. See AAA/ABA-ACD, supra note 7, at 2 (”It is inconsistent with the integrity of the arbitration process for persons to solicit appointments for themselves. However, a person may indicate a general willingness to serve as arbitrator.”); Haw. Stds., supra note 11, § X(3) (“A mediator shall only make accurate statements about the mediation process, its costs and benefits, and the mediator’s qualifications.”); see also SPIR, supra note 19, § 6 (“A mediator shall withdraw from a mediation when incapable of serving or when unable to remain impartial.”); Fla. Stds., supra note 10, XI(B) (“A mediator shall not use the mediation process to solicit, encourage or otherwise incur future professional services with either party.”); AFCC, supra note 21, § IV.

82. For a comparison of codes regarding solicitation and advertising, see AFM, supra note 20 (“A mediator shall make only accurate statements about the mediation process, its costs and benefits, and the mediator’s qualifications.”); Dallas Stds., supra note 12 (“The mediator should not make any false, misleading, or unfair statement or claim as to the mediation process, costs and benefits, and as to his role, skills, and qualifications.”); Or. Stds., supra note 14 (“All mediation advertising must honestly represent the mediator’s qualifications and the services to be rendered. No claims of specific results or promises should be made.”); SPIR, supra note 19, § 7 (providing that “a mediator shall be truthful in advertising and solicitation for mediation”).
IX. FEES: A MEDIATOR SHALL FULLY DISCLOSE AND EXPLAIN THE BASIS OF COMPENSATION, FEES, AND CHARGES TO THE PARTIES

The Standards require that parties be provided sufficient information about fees at the outset of a mediation to determine if they wish to retain the services of the mediator. They further encourage mediators to enter into written agreements with the parties that include fees, anticipated costs, and the time and manner of payment. If the mediator withdraws from the mediation, the Standards suggest that the mediator return any unearned fee to the parties.

Various ADR organizations require mediators to explain to the parties at the beginning of the process the basis for all compensation or other fees. Some organizations such as the AAA also serve in the role of collecting and disbursing the fees of mediators. Although mediators’ fees are generally unregulated, the Standards suggest that they be controlled by the principle of reasonableness and that mediators should not base their fees or make them contingent upon the amount of the settlement or on the outcome of the dispute resolution process. The comments to this Standard specifically discourage contingent fee arrangements due to the potential for abuses that can diminish confidence in the process. This Standard serves to dispel

83. See Haw. Stds., supra note 11, § IV(2) (requiring a written agreement with the parties before commencing the process).

84. See SPIDR, supra note 19, § 8 (requiring mediators to explain to parties at the outset the rate of fees or charges); see also Fla. Stds., supra note 10, § VII(A) and (C) (requiring written disclosure of fees and costs “including time and manner of payment”).

85. See AAA/ABA-ACD, supra note 7, at 6 (preferring the establishment of a basis of payment before accepting appointment); SPIDR, supra note 19, § 8 (requiring the neutral to explain to the parties at the outset the bases for compensation, fees, and charges); Colo. Stds., supra note 13, at 117 (requiring the mediator to inform all parties of the cost prior to the intervention); Dallas Stds., supra note 12 (requiring fee structures and method of payment to be established with both parties in advance of services); Fla. Stds., supra note 10 (requiring the written explanation of fees be given to parties prior to mediation to include the basis for and amount of charges); Or. Stds., supra note 14 (requiring mediator to define and describe any fees for the mediation and to agree with both parties how fees will be shared and the manner of payment before substantive negotiations begin).

86. See AFM, supra note 20 (providing that “a mediator shall explain fees and agree on how fees will be paid and the method of payment and that fees shall be explicit, fair, reasonable, and commensurate with service to be performed”); AFCC, supra note 21 (requiring that fees be reasonable and that mediator explain fee structure to the parties).

87. See Fla. Stds., supra note 10, § VII (prohibiting fees based on the outcome of the dispute); see also Haw. Stds., supra note 11, § IV(2). For similar prohibition see ABA/SPIDR: REPORT TO THE HOUSE OF DELEGATES: LAWYERS ACTING AS MEDIATORS FOR NON-CLIENTS (providing lawyers cannot charge a fee contingent on the outcome of the mediation); CDS-IJA, supra note 22 (providing that fees should not be based on outcome of the dispute).
any incentive for a mediator to coerce settlements between the parties. Under a contingent fee arrangement, a mediator has a self-interest which may compete with the need to avoid conflicts of interest. The comments also disfavor referral fees and state that no commissions, rebates or other forms of remuneration should be given or received by a mediator for the referral of clients. Mediators should not directly or indirectly request, solicit or receive gifts or any other type of compensation other than the agreed upon fee.

X. Obligations to the Mediation Process: Mediators Have a Duty to Improve the Practice of Mediation

Under the Standards, mediators have a continuing responsibility to improve the practice of mediation. Implicit is the obligation not to make exaggerated claims or promises about the mediation process, its costs and benefits, its outcome or the mediator's qualifications. Mediators are also regarded as knowledgeable in the process of alternative dispute resolution and as such should use their knowledge to help educate the public regarding the benefits of mediation. Further, they should make mediation accessible to those who would like to use it, but are unable to afford it. Giving expression to the spirit of public service, the Standards encourage mediators to engage and volunteer in pro bono mediations.

XI. Conclusion

The Standards of Conduct for Mediators are intended to be a starting point in the development of national ethical guidelines for the practice of mediation. They do not deal with the role of party representatives in a mediation, or the responsibility of organizations and entities which appoint individuals to serve as mediators. These are, of

88. See SPIDR, supra note 19, § 8 (prohibiting the acceptance of commissions or fees for the referral of mediation clients).

89. Mediators should keep in mind the claimed disadvantages to the use of mediation and work accordingly to resolve such problems for the benefit of the general public. Some of these are: (a) a lack of communication about such a process; (b) skepticism about mediation; (c) a mediation may signal weakness; and (d) a lawyer's self-interest not to use mediation. See Andreas Nelle, Making Mediation Mandatory: A Proposed Framework, 7 Ohio St. J. on Disp. Resol. 287, 298 (1991); see also Richard C. Reuben, The Lawyer Turns Peacemaker, A.B.A. J., Aug. 1996, at 55, 57 (providing a discussion on the arrival of mediation).

90. See William O. Flannery, Corporate Law Department Pro Bono Programs, B.B.J., Nov.-Dec. 1993, at 12, 28 (providing that pro bono programs in many law firms encourage mediation where the lawyers donate both personal and firm time to assist in dispute resolution programs).
course, subjects deserving of consideration. The Standards offer general considerations for people who take on the role of mediators. They are aspirational in nature and are intended to be guideposts toward the development of uniform standards of conduct for mediators. By attempting to encourage the development of national standards, the joint committee of the AAA, ABA and SPIDR hope to boost public confidence in a field that does not require certification, a license, or a law or other professional degrees. While discussion and application of these Standards is strongly encouraged, it is ultimately left to the participants in the field to determine if the Standards are appropriate for their use and, if so, how they will be applied and implemented, if at all. The joint committee is gratified by the response to date to the Standards.\footnote{\textsuperscript{91}}

\footnotetext{\textsuperscript{91} \textit{The Standards of Conduct for Mediators} has been approved by the AAA, SPIDR, and the Dispute Resolution and Litigation Sections of the ABA. They also have been adopted by other groups. \textit{See, e.g., Final Report of the Chief Judge's New York State Court Alternative Dispute Resolution Project, May 1, 1996; Conciliation Rules of the Archdiocese of New York. See also Minn. Draft Rule 114, supra note 43 (referring to the Standards).}
APPENDIX A
STANDARDS OF CONDUCT FOR MEDIATORS

Introductory Note

The initiative for these standards came from three professional groups: the American Arbitration Association, the American Bar Association, and the Society of Professionals in Dispute Resolution.

The purpose of this initiative was to develop a set of standards to serve as a general framework for the practice of mediation. The effort is a step in the development of the field and a tool to assist practitioners in it—a beginning, not an end. The standards are intended to apply to all types of mediation. It is recognized, however, that in some cases the application of these standards may be affected by laws or contractual agreements.

Preface

The standards of conduct for mediators are intended to perform three major functions: to serve as a guide for the conduct of mediators; to inform the mediating parties; and to promote public confidence in mediation as a process for resolving disputes. The standards draw on existing codes of conduct for mediators and take into account issues and problems that have surfaced in mediation practice. They are offered in the hope that they will serve an educational function and provide assistance to individuals, organizations, and institutions involved in mediation.

Mediation is a process in which an impartial third party—a mediator—facilitates the resolution of a dispute by promoting voluntary agreement (or "self-determination") by the parties to the dispute. A mediator facilitates communications, promotes understanding, focuses the parties on their interests, and seeks creative problem-solving to enable the parties to reach their own agreement. These standards give meaning to this definition of mediation.

I. **SELF-DETERMINATION:** A MEDIATOR SHALL RECOGNIZE THAT MEDIATION IS BASED ON THE PRINCIPLE OF SELF-DETERMINATION BY THE PARTIES.

Self-determination is the fundamental principle of mediation. It requires that the mediation process rely upon the ability of the parties
to reach a voluntary, uncoerced agreement. Any party may withdraw from mediation at any time.

COMMENTS: * The mediator may provide information about the process, raise issues, and help parties explore options. The primary role of the mediator is to facilitate a voluntary resolution of a dispute. Parties shall be given the opportunity to consider all proposed options. * A mediator cannot personally ensure that each party has made a fully informed choice to reach a particular agreement, but it is a good practice for the mediator to make the parties aware of the importance of consulting other professionals, where appropriate, to help them make informed decisions.

II. IMPARTIALITY: A MEDIATOR SHALL CONDUCT THE MEDIATION IN AN IMPARTIAL MANNER.

The concept of mediator impartiality is central to the mediation process. A mediator shall mediate only those matters in which she or he can remain impartial and evenhanded. If at any time the mediator is unable to conduct the process in an impartial manner, the mediator is obligated to withdraw.

COMMENTS: * A mediator shall avoid conduct that gives the appearance of partiality toward one of the parties. The quality of the mediation process is enhanced when the parties have confidence in the impartiality of the mediator. * When mediators are appointed by a court or institution, the appointing agency shall make reasonable efforts to ensure that mediators serve impartially. * A mediator should guard against partiality or prejudice based on the parties' personal characteristics, background or performance at the mediation.

III. 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.
A conflict of interest is a dealing or relationship that might create an impression of possible bias. The basic approach to questions of conflict of interest is consistent with the concept of self-determination. The mediator has a responsibility to disclose all actual and potential conflicts that are reasonably known to the mediator and could reasonably be seen as raising a question about impartiality. If all parties agree to mediate after being informed of conflicts, the mediator may proceed with the mediation. If, however, the conflict of interest casts serious doubt on the integrity of the process, the mediator shall decline to proceed.

A mediator must avoid the appearance of conflict of interest both during and after the mediation. Without the consent of all parties, a mediator shall not subsequently establish a professional relationship with one of the parties in a related matter, or in an unrelated matter under circumstances which would raise legitimate questions about the integrity of the mediation process.

COMMENTS:  
* A mediator shall avoid conflicts of interest in recommending the services of other professionals. A mediator may make reference to professional referral services or associations which maintain rosters of qualified professionals.
* Potential conflicts of interest may arise between administrators of mediation programs and mediators and there may be strong pressures on the mediator to settle a particular case or cases. The mediator’s commitment must be to the parties and the process. Pressure from outside of the mediation process should never influence the mediator to coerce parties to settle.

IV. COMPETENCE: A MEDIATOR SHALL MEDIATE ONLY WHEN THE MEDIATOR HAS THE NECESSARY QUALIFICATIONS TO SATISFY THE REASONABLE EXPECTATIONS OF THE PARTIES.

Any person may be selected as a mediator, provided that the parties are satisfied with the mediator’s qualifications. Training and experience in mediation, however, are often necessary for effective mediation. A person who offers herself or himself as available to serve as a mediator gives parties and the public the expectation that she or he has the competency to mediate effectively. In court-connected or other forms of mandated mediation, it is essential that mediators assigned to the parties have the requisite training and experience.
COMMENTS: * Mediators should have information available for the parties regarding their relevant training, education and experience.
* The requirements for appearing on a list of mediators must be made public and available to interested persons.
* When mediators are appointed by a court or institution, the appointing agency shall make reasonable efforts to ensure that each mediator is qualified for the particular mediation.

V. CONFIDENTIALITY: A MEDIATOR SHALL MAINTAIN THE REASONABLE EXPECTATIONS OF THE PARTIES WITH REGARD TO CONFIDENTIALITY.

The reasonable expectations of the parties with regard to confidentiality shall be met by the mediator. The parties' expectations of confidentiality depend on the circumstances of the mediation and any agreements they may make. A mediator shall 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.

COMMENTS: * The parties may make their own rules with respect to confidentiality, or the accepted practice of an individual mediator or institution may dictate a particular set of expectations. Since the parties' expectations regarding confidentiality are important, the mediator should discuss these expectations with the parties.
* If the mediator holds private sessions with a party, the nature of these sessions with regard to confidentiality should be discussed prior to undertaking such sessions.
* In order to protect the integrity of the mediation, a mediator should avoid communicating information about how the parties acted in the mediation process, the merits of the case, or settlement offers. The mediator may report, if required, whether parties appeared at a scheduled mediation.
* Where the parties have agreed that all or a portion of the information disclosed during a mediation is confidential, the parties' agreement should be respected by the mediator.
* Confidentiality should not be construed to limit or prohibit the effective monitoring, research, or evaluation of mediation programs by responsible persons. Under appropriate circumstances, researchers may be permitted to obtain access to statistical data and, with the permission of the parties, to individual case files,
observations of live mediations, and interviews with participants.

VI. 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.

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

COMMENTS:
* A mediator may agree to mediate only when he or she is prepared to commit the attention essential to an effective mediation.
* Mediators should only accept cases when they can satisfy the reasonable expectations of the parties concerning the timing of the process. A mediator should not allow a mediation to be unduly delayed by the parties or their representatives.
* The presence or absence of persons at a mediation depends on the agreement of the parties and mediator. The parties and mediator may agree that others may be excluded from particular sessions or from the entire mediation process.
* The primary purpose of a mediator is to facilitate the parties' voluntary agreement. 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 must 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 consider resolving their dispute through arbitration, counseling, neutral evaluation, or other processes. 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.
* A mediator shall withdraw from a mediation when incapable of serving or when unable to remain impartial.
* A mediator shall withdraw from the mediation or postpone a session if the mediation is being used to further illegal conduct, or if a party is unable to participate due to drug, alcohol, or other physical or mental incapacity.
* Mediators should not permit their behavior in the mediation process to be guided by a desire for a high settlement rate.

VII. ADVERTISING AND SOLICITATION: A MEDIATOR SHALL BE TRUTHFUL IN ADVERTISING AND SOLICITATION FOR MEDIATION

Advertising or any other communication with the public concerning services offered or regarding the education, training, and expertise of the mediator shall be truthful. Mediators shall refrain from promises and guarantees of results.

COMMENTS:
* It is imperative that communication with the public educate and instill confidence in the process.
* In an advertisement or other communication to the public, a mediator may make reference to meeting 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.

VIII. FEES: A MEDIATOR SHALL FULLY DISCLOSE AND EXPLAIN THE BASIS OF COMPENSATION, FEES, AND CHARGES TO THE PARTIES.

The parties should be provided sufficient information about fees at the outset of a mediation to determine if they wish to retain the services of a mediator. If a mediator charges fees, the fees shall be reasonable considering, among other things, the mediation service, the type and complexity of the matter, the expertise of the mediator, the time required, and the rates customary in the community. The better practice in reaching an understanding about fees is to set down the arrangements in a written agreement.

COMMENTS:
* A mediator who withdraws from a mediation should return any unearned fee to the parties.
* A mediator should not enter into a fee agreement which is contingent upon the result of the mediation or amount of the settlement.
* Co-mediators who share a fee should hold to standards of reasonableness in determining the allocation of fees.
* A mediator should not accept a fee for referral of a matter to another mediator or to any other person.

IX. OBLIGATIONS TO THE MEDIATION PROCESS: MEDIATORS HAVE A DUTY TO IMPROVE THE PRACTICE OF MEDIATION.

COMMENTS: * Mediators are regarded as knowledgeable in the process of mediation. They have an obligation to use their knowledge to help educate the public about mediation; to make mediation accessible to those who would like to use it; to correct abuses; and to improve their professional skills and abilities.