

Basic Principles of Conduct for Mediators

While several model guidelines for mediators have been developed, they are often criticized as being vague and ambiguous. Most prominent is the Model Standards of Conduct for Mediators, developed jointly by American Arbitration Association, the American Bar Association (Section of Dispute Resolution), and the Society of Professionals in Dispute Resolution (now the Association for Conflict Resolution). Additionally, the American Bar Association has recognized some of the differences between the traditional role of litigators and the emerging duties of mediators. The recent “Ethics 2000” amendments to the Model Rules of Professional Conduct refer to counselors acting as mediators as “third party neutrals” and provide some guidance for lawyer-mediators. However, the Model Rules of Professional Conduct are still vague on many particulars, and silent on others, as the field of mediation continues to develop.

The improvement of these standards is compounded by the tension between maintaining the traditional flexibility of mediation with the need for predictable guidelines for behavior. Additionally, some advocates for the increased use of mediation as an alternative dispute resolution mechanism have suggested that ethical rules should be utilized to separate the problem-solving approach of mediation from the adversarial approach to litigation. These advocates argue that attorneys are trained from law school forward to be adversarial, and are not likely to adapt to the needs of mediation without the reinforcement of ethical codes of conduct.

The basic standards for mediators include (*see generally* Model Standards of Conduct for Mediators, available at www.abanet.org/dispute/webpolicy.html; Model Rule for the Lawyer as Third-Party Neutral, CPR-Georgetown Commission on Ethics and Standards in ADR, CPR Institute for Dispute Resolution, November 2002, available at <http://www.cpradr.org/pdfs/cprgeorge-modelrule.pdf>):

- Self-determination of the parties
 - The mediator must allow the parties to reach a voluntary, uncoerced agreement. The parties decide when and under what conditions they will reach an agreement or terminate a mediation. *See* Model Standards of Conduct for Mediators, Standard I, p. 1.
 - Evaluative vs. facilitative models – the Model Standards seem to adopt a facilitative approach, where the mediator does not give legal advice to the parties. *See* Samuel J. Imperati, *Mediator Practice Models: The Intersection of Ethics and Stylistic Practices in Mediation*, 33 Willamette L. Rev. 703, 709-713 (1997); Model Rule for the Lawyer as Third-Party Neutral, p. 7. This may become problematic where one side has considerably more knowledge, either factual or legal, than the other side. This difficulty may be magnified where one side has counsel and the other is pro se. The problem is that if the settlement is based on an erroneous understanding of law or fact, does it really constitute a voluntary and uncoerced agreement? A suggested approach is to continually remind each party that they should consult legal counsel over issues that arise. In the case of unrepresented parties, the mediator might insist that the party review the proposals again, without specifically pointing out the particular legal issue.

If an issue results in such an unequal bargaining power that the settlement is not voluntary, the mediator might need to step down.

- This raises a number of questions: Does the mediator have an ethical duty to correct a party's erroneous legal interpretation? Should any duty be different in regards to pro se clients as opposed to those represented by counsel? Should there be a different standard for misunderstandings of material facts as opposed to the applicable law?
- Another potential problem is when a party asks the mediator to evaluate a settlement proposal. The mediator should avoid giving professional advice. *See Model Standards of Conduct for Mediators, Standard VI, Comments, p. 4.* This has led to a distinction between giving legal advice and making legal information available. The common distinction is that the former constitutes application of the law to the facts at hand, whereas the latter is a generic statement of the law. In practice, this may be a distinction without a difference, and the mediator must be consciously aware of the level of participation in the process. It is good for the mediator and the parties to agree in advance, as much as possible, to the level of the mediator's involvement.

- Impartiality
 - The mediator must remain an impartial third party throughout the mediation process. Because the parties must have confidence in the mediator, the mediator must avoid even the appearance of partiality towards one of the parties. *See Model Standards of Conduct for Mediators, Standard II, Comments, p. 2.*
 - If the mediator feels that they cannot be impartial, they are obligated to withdraw from the mediation. *See Model Standards of Conduct for Mediators, Standard II, p. 2.*

- Conflicts of Interest
 - The mediator must disclose all potential conflicts of interest to the parties. It is then up to the parties to decide whether to retain the mediator. The parties must unanimously agree on retention. *See Model Standards of Conduct for Mediators, Standard III, p. 2.*
 - For example, if the mediator has had a prior professional relationship with one of the parties, this should be disclosed. In keeping with the concept of self-determination, the parties then decide whether such a relationship is acceptable.
 - Potential conflicts of interest include anything that might create the impression of impartiality.
 - The mediator must obtain the consent of all parties before establishing a post-mediation professional relationship with one of the parties if such a relationship would raise questions about the integrity of the mediation process. *See Model Standards of Conduct for Mediators, Standard III, p. 2.*
 - It should be noted that the "Ethics 2000" amendment to the Model Rules of Professional Conduct prohibits only the mediator from future representation of a party to the mediation. Other members of the mediator's firm may represent the party so long as the mediator is timely screened from participation in the matter. *See Rule 1.12: Former Judge, Arbitrator, Mediator or Other Third-Party Neutral, Model Rules of Professional Conduct, Ethics 2000 – February 2002 Report, available at http://www.abanet.org/cpr/e2k-112_202.html*

- Competence
 - The mediator must have the necessary qualifications to satisfy the reasonable expectations of the parties. *See* Model Standards of Conduct for Mediators, Standard IV, p. 3. This will often mean that the mediator should have training and experience in mediation. *See* Model Standards of Conduct for Mediators, Standard IV, p. 3.
 - An unanswered question is whether the mediator must have specific knowledge in the subject matter at the heart of the dispute. While most standards do not seem to impose this requirement, it should be recognized that in highly specialized or technical areas such experience or knowledge would be helpful in understanding the dispute. This must be weighed, however, against the possibility of impartiality, where the knowledge might bias the mediator towards a particular party. For example, in a dispute between an employer and employee in a highly specialized industry, it might be helpful to have a mediator that has experience in that field. However, if the mediator was a former employer in the industry, they might appear to be partial towards the employer's point of view.

- Confidentiality
 - The mediator must meet the reasonable expectations of the parties regarding confidentiality. *See* Model Standards of Conduct for Mediators, Standard V, p. 3. The parties are free to make their own rules regarding confidentiality. The mediator should discuss the parties' expectations prior to beginning substantive mediation so that they are fully understood. *See* Model Standards of Conduct for Mediators, Standard V, Comments, p. 3.
 - There is now a federal privilege of mediation, and most states recognize such a privilege as well. *See* 28 U.S.C. § 652(d); 42 Pa.C.S. § 5949 (2003); Sheldone v. Pennsylvania Turnpike Commission, 104 F. Supp. 2d 511 (W.D.Pa. 2000); Samuel J. Imperati, *Mediator Practice Models: The Intersection of Ethics and Stylistic Practices in Mediation*, 33 Willamette L. Rev. 703, 730-735 (1997). Any disclosures or admissions put forth in mediation ordinarily cannot be used in later proceedings, whether or not the mediation succeeds or fails.
 - The mediator should not disclose any information that a party expects to be confidential. For example, if a party in a private caucus with the mediator discloses information but tells the mediator that it is confidential, the mediator ordinarily should not disclose that information to the other party, even if it would facilitate settlement.
 - This may lead to a conflict of interests between confidentiality and self-determination. For example, if a party confidentially discloses that the other party has misinterpreted or failed to recognize a legal principle, a subsequent settlement might not be viewed as truly voluntary and uncoerced. This is particularly true since the mediation is supposed to be a cooperative effort rather than an adversarial exercise (many scholars, at least, bristle at the notion of "winning at mediation"). Again, this conflict in principles may be especially troublesome in situations where one party is not represented by legal counsel.

- In such a circumstance, the mediator may insist that the knowledgeable party disclose the information to the other party. The mediator may also instruct the adverse party to take another look at the legal principles, or suggest again the need for legal counsel. The mediator should not, however, communicate the confidential information. If these efforts fail, and the mediator feels that the process has been damaged to the point where settlement would not truly reflect the self-determination of the parties, the mediator should withdraw from the mediation.
- Truthfulness in advertising and solicitation for services
 - The mediator may only refer to meeting a particular entity's qualification standards if that entity has a procedure in place for certification. *See* Model Standards of Conduct for Mediators, Standard VII, Comments, p. 5.
 - Mediators should not promise particular results. *See* Model Standards of Conduct for Mediators, Standard VII, p. 4.
- Fees must be fully disclosed at the outset
 - Contingent fees are not permitted. While arguments have been put forth that contingent fees might be helpful in certain circumstances where both parties agree to such an arrangement, the model standards clearly reject this approach. *See* Model Standards of Conduct for Mediators, Standard VIII, Comments, p. 5.
- Duty to improve the practice of mediation
 - In addition to generally improving the practice of mediation, the mediator must recommend other options to the parties, including arbitration, counseling, etc. *See* Model Standards of Conduct for Mediators, Standard IX, p. 5; Standard VI, Comments, p. 4.

Basic issues confronting attorneys advising clients in mediation

The basic question is whether attorneys that serve as counsel inside a mediation proceeding should be held to different ethical standards than attorneys in more traditional adversarial proceedings. Again, the key distinction is that the mediation process is supposed to be a cooperative effort rather than an adversarial proceeding. A primary argument for a different ethical code for attorneys involved in mediation is that without such a code, and potential consequences, attorneys will simply fall back on the modes for which they have been trained since law school, and that this will run counter to the goals and objectives of mediation.

Attorneys who represent clients in mediation proceedings must comply with the normal code of ethics to which any practicing attorney must adhere. Beyond this, the ethical considerations should be guided by the agreed upon expectations of the client, any applicable independent substantive or procedural rules (for example, local court rules), and whatever rules are agreed upon by the parties in advance of the substantive mediation.

The most common areas of ethical concern include:

- Deception – specifically use of deceptive tactics
 - Both directly with the other party, and in caucus with the mediator
 - Attorney may not make a material misrepresentation of a material fact or law (Model Rules of Professional Conduct 4.1)
 - Normal conventions of negotiating may be employed.
 - Several questions remain unanswered:
 - Should there be different standards for truthfulness in negotiation and mediation?
 - Should there be different standards for truthfulness in mediation for lawyers and non-lawyers?
- Confidential information
 - Unless the client authorizes disclosure of confidential information, client confidences must be maintained (Model Rules of Professional Conduct 1.6).
 - Most states and the federal courts now recognize a “mediation privilege”, meaning that information that becomes known solely because of the mediation cannot be compelled in later proceedings, whether or not the mediation succeeds or fails.
 - Confidentiality between the parties and the mediator is often dealt with by contract before substantive mediation begins.
 - The development of the mediation privilege and the contractual agreements regarding confidentiality are important because the mediator, as a third party, is not subject to traditional confidentiality protections (attorney-client, for example).
- Duties to correct erroneous factual and/or legal beliefs by the opposing side
 - See the discussion above; while a party may not be required to correct erroneous information, it very well may be advantageous to do so given the goal of mediation to reach a common agreement. The mediator may force the issue if they feel that the lack

of disclosure would unfairly result in a settlement that was not truly voluntary and uncoerced.

- Practice of law – does participation in mediation constitute the “practice of law”
 - A related question is whether mediation, particularly court-sponsored mediation, is a “tribunal” within the meaning of Model Rule 3.3, which requires a lawyer to disclose to a tribunal legal authority in the controlling jurisdiction known to be directly adverse to the position of the client. *See* Model Rules of Professional Conduct 1.0 (m) for a definition of “tribunal.” The “Ethics 2000” amendments do not include the mediator (or the mediation) under the definition of tribunal, meaning that an attorney representing a party at mediation only owes the mediator the same basic level of candor owed to the opposing party. *See* Proposed Changes to the Model Rules of Professional Conduct per the Ethics 2000 Commission, Model Rule 2.4, Center for Professional Responsibility, available at <http://www.abanet.org/cpr/e2k-rule24.html>.

- Other potential issues
 - Many jurisdictions require lawyers to advise clients about mediation, arbitration, and other forms of settlement that might be more appropriate than litigation.
 - The question has arisen: what should an attorney do if after formal discovery closes the parties go to mediation and a new piece of information becomes known? Does the attorney have any ethical obligation not to use this information? Unfortunately, because of the lack of developed standards, the answer is not always clear.
 - On the one hand, the mediation is a separate process from the litigation. The ABA seems to have concluded that mediation is not the practice of law, that the mediation proceeding is not a tribunal, and that mediation is not simply a facilitated negotiation. *See* Resolution on Mediation and the Unauthorized Practice of Law, adopted by the ABA Section of Dispute Resolution on February 2, 2002, p. 1, available at <http://www.abanet.org/dispute/resolution2002.pdf>. It would seem that parties at mediation simply must meet the standard enumerated in Model Rule 4.1 to not make material misrepresentations. Of course, if the mediation fails, the attorney would be subject to whatever rules would govern the new information at later litigation proceedings. Even if the attorney were to reveal the new information during the mediation, they could not hide behind the “mediation privilege” to keep this information from being used at a later proceeding if the normal rules would have forced its disclosure during the later proceeding. Similarly, if rules would bar the introduction of the information at later proceedings, the fact that it was used in mediation would not render it admissible.
 - On the other hand, mediation increasingly is becoming a step in the litigation process. In particular, if a court has ordered mediation, it is difficult to see why the ethical rules that govern discovery should be suspended during the pendency of the mediation. To a certain extent, this would seem to frustrate the goals of the discovery process.
 - One approach is to have the parties agree contractually, in advance of substantive mediation, how they will handle such a situation.

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Scenario 1
Late Night Success?

A mediation starting at 9:00 A.M. concludes at 1:00 A.M. with a settlement document drafted by counsel for the parties with the mediator's input and signed in everyone's presence. Ten days later, the Plaintiff has a new lawyer that contacts everybody. New Lawyer contends that the settlement was signed in duress and not valid.

1. New lawyer calls the mediator. What should the mediator do?
2. New Lawyer calls Original Lawyer with same allegations of duress and new allegations that Original Lawyer knows did not occur and which Mediator would validate as not occurring. What issues does this raise? As Original Lawyer, what should you do?
3. You are opposing counsel to New Lawyer. What should you do?
4. Does it make any difference that Plaintiff herself had six previous lawyers before the mediation?
5. Does it make a difference if Plaintiff told everyone that she did not feel tired or under any duress at 10 p.m. and that it was her insistence to conclude the mediation that night rather than continue to another day?
6. The Judge telephones you, the advocate, to discuss the matter informally:
 - A. Does it make a difference if the Judge asks you to meet in her chambers informally?
 - B. Does it make a difference if the Judge is an old friend and asks you to meet her for lunch to discuss the case off the record?

Notes:

Scenario 2
He Said She Said

The dispute is between two employees, A and B, and Supervisor S. A accused B of taking excessive lunch time and breaks and being late to relieve A at the reception desk. There is a blow

up when Employee A had to cancel a doctor’s appointment scheduled during lunchtime because B was late to relieve A. Employee B was late because Supervisor S told her not to relieve Employee A and to finish another project S had B working on. The matter was referred to internal mediation. During a confidential caucus with A, the following occurs:

Mediator: How do you feel about Supervisor S?
A: I hate S. Even the snot-nosed kids of S.
Mediator: Do you have any ideas concerning how you would like to see the conflict resolved?
A: It would be great if my brakes failed in the parking lot and I accidentally ran S over. That would end it.

What duties, if any, arise in this context for you as advocate for Employee A? What response, if any, should you make?

Scenario 3
The Outspoken Client

You’re in private caucus with the mediator as defense advocate in an employment case. Your client has taken the position that the supervisor has done nothing wrong. In fact, you as counsel were retained to do a confidential investigation which verifies plaintiff’s allegations. At mediation, the Mediator asks if any internal investigations occurred and, if so, what were the findings? Before you, as counsel, can answer, your client jumps in and says “No.”

What responses, if any, should you make?

What are your responsibilities as advocate?