

STANDARDS OF ETHICS AND PROFESSIONAL RESPONSIBILITY FOR CERTIFIED MEDIATORS

(Adopted by the Judicial Council of Virginia, June 2002)

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A. Preamble

The Commonwealth of Virginia permits the referral of civil disputes pending in court to mediators certified pursuant to Guidelines adopted by the Judicial Council of Virginia. The referral of cases from the court system to mediation places an important responsibility upon persons who serve as mediators. Confidence in the mediation process and in the integrity and competence of mediators depends upon mediators conducting themselves in accordance with the highest ethical standards. ~~Mediators shall conduct themselves in a manner that will instill confidence in the mediation process, confidence in the integrity and competence of mediators, and confidence that the disputes entrusted to mediators are handled in accordance with the highest ethical standards.~~ These standards are intended to guide the conduct of mediators certified pursuant to Guidelines adopted by the Judicial Council of Virginia and to promote public and judicial confidence in the mediation process.

~~These standards are not intended to unduly restrict the practice of mediation and recognize the need for flexibility in style and process. These standards are intended to guide the conduct of mediators certified pursuant to Guidelines adopted by the Judicial Council of Virginia and to promote public and judicial confidence in the mediation process. The comments contained in the body of these Standards are meant to be interpretative of the main text of the standards.~~

The Preamble and Scope provide general orientation. The text of the body of these Standards is authoritative and the Comments accompanying each section are interpretive.

B. Scope

These Standards of Ethics and Professional Responsibility apply to all certified mediators: in their capacity 1) as mediators in court-referred and privately-referred matters in the Commonwealth of Virginia; 2) as mediation trainers; and 3) as mediation mentors.

These standards are not intended to unduly restrict the practice of mediation and recognize the need for flexibility in style and process.

C. Assessing the Appropriateness of the Mediation

Prior to agreeing to mediate, and throughout the process, the mediator should determine that:

1. mediation is an appropriate process for the parties;
2. each party is able to participate effectively within the context of the mediation —process; and

3. each party is willing to enter and participate in the process in good faith.

If in the judgment of the mediator the conditions specified in C.1. through C.3. are not met, the mediator shall not agree to mediate or, if the concerns arise after the process has begun, shall consider suspending or terminating the process.

Comment: Section 8.01-576. 5 of the Code of Virginia allows a court to refer any contested civil matter to a dispute resolution orientation session. "Orientation session" is defined in section 8.01-576.4 as a preliminary meeting during which the parties and the neutral assess the case and decide whether to continue with a dispute resolution proceeding or adjudication. A major goal of the orientation session is to educate the parties about dispute resolution processes available to them, such as mediation.

The orientation session can also play an important role as an assessment tool. Assessment as to whether a case is appropriate for a dispute resolution process, like mediation, may involve, particularly in family cases, separate screening interviews with the ~~clients~~ parties. Where appropriate, these interviews should include specific questions regarding violence and abuse (physical, emotional, and verbal abuse and/or threats), child abuse/neglect, drug and/or alcohol use, and balance of power. In cases where separate screening interviews have been conducted by an intake specialist or organization, such as a court program or community mediation center, such screening ~~will~~ must meet the requirements of this section. This in no way relieves the mediator from continual assessment of appropriateness throughout the mediation process.

D. Initiating the Process

1. Description of Mediation Process. The mediator shall define mediation and describe the mediation process to the parties and their attorneys, if present.

a) Mediation is a process in which a neutral facilitates communication between the parties and, without deciding the issues or imposing a solution on the parties, enables them to understand and to reach a mutually agreeable resolution to their dispute.

b) The description of the process shall include an explanation of the role of the mediator.

c) The mediator shall also describe his style and approach to mediation. The parties must be given an opportunity to express their expectations regarding the conduct of the mediation process. The parties and mediator must include in the agreement to mediate a general statement regarding the mediator's style and approach to mediation to which the parties have agreed.

d) The mediator shall describe the stages of the mediation process. ~~shall be described by the mediator.~~

2. Procedures

a) Prior to commencement of a court-referred mediation, the mediator shall inform the parties in writing of the following:

- 1) The mediator does not provide legal advice.
- 2) Any mediated agreement may affect the legal rights of the parties.
- 3) Each party to the mediation has the opportunity to consult with independent legal counsel at any time and is encouraged to do so.
- 4) Each party to the mediation should have any draft agreement reviewed by independent counsel prior to signing the agreement.

b) In all other cases, the mediator shall inform the parties, orally or in writing, of the substance of the following:

- 1) The mediator does not provide legal advice.
- 2) Any mediated agreement may affect the legal rights of the parties.
- 3) Each party to the mediation has the opportunity to consult with independent legal counsel at any time and is encouraged to do so.
- 4) Each party to the mediation should have any draft agreement reviewed by independent counsel prior to signing the agreement.

c) The mediator ~~should~~ shall reach an understanding with the participants regarding the procedures which may be used in mediation. This includes, but is not limited to, the practice of separate meetings (caucus) between the mediator and participants, the involvement of additional interested persons, the procedural effect on any pending court case of participating in the mediation process, and conditions under which mediation may be terminated by the mediator.

d) If the mediation is conducted in conjunction with another dispute resolution process, such as arbitration, and the same neutral conducts both processes, the mediator must describe to the parties the procedures to be followed in both processes clearly, prior to entering into the agreement to mediate.

Comment: In section D.1.b., the description of the mediation process may include an explanation of the role of the mediator as that of a facilitator, not advocate, judge, jury, counselor or therapist. The role of the mediator also includes, but is not limited to, assisting the parties in identifying issues, reducing obstacles to communication, maximizing the exploration of alternatives, and helping the parties reach voluntary agreements.

In Section D.1.d., the stages of mediation should include at a minimum, an opportunity for all the parties to be heard, the identification of issues to be resolved in mediation, the generation of alternatives for resolution, and, if the parties so desire, the development of a Memorandum of Understanding or Agreement.

In Section D.2.b., the primary role of the mediator is to facilitate the voluntary resolution of a dispute. In order to ensure that parties make informed decisions, mediators should make the parties aware of the importance of consulting other professionals. Particularly where legal rights are involved or the parties' expectation is to enter into a binding and enforceable agreement, clear notification of the information in (b) 1-4 is essential. A mediator can

most effectively verify that he or she has informed the parties of the items listed in (b) 1-4 if these items are put in writing.

E. Self Determination

1. Mediation is based on the principle of self-determination by the parties. Self-determination requires that the mediator rely on the parties to reach a voluntary agreement.
2. The mediator may provide information about the process, raise issues, and help explore options. The primary role of the mediator is to facilitate a voluntary resolution of a dispute.
3. The mediator may not coerce a party into an agreement, and shall not make decisions for any party to the mediation process.
4. The mediator shall promote a balanced process and shall encourage the parties to conduct the mediation in a collaborative, non-adversarial manner.
5. Where appropriate, the mediator shall promote consideration of the interests of persons affected by actual or potential agreements who are not present or represented at the mediation.

F. Professional Information

1. The mediator shall encourage the participants to obtain independent expert information and/or advice when such information and/or advice is needed to reach an informed agreement or to protect the rights of a participant.
2. A mediator ~~shall~~ may give information only in those areas where qualified by training or experience and only if the mediator can do so consistent with these Standards.
3. When providing information, the mediator shall do so in a manner that does not interfere with ~~will neither affect the parties' perception of the mediator's impartiality, nor the self-determination of the parties, self-determination.~~

Comment: The role of the mediator differs substantially from other professional roles. Mixing the role of a mediator and the role of another professional is problematic and thus, a mediator should distinguish between the roles. For additional information, see Virginia's Guidelines on Mediation and the Unauthorized Practice of Law.

G. Impartiality

1. A mediator shall conduct a mediation in an impartial manner. Impartiality means freedom from favoritism or bias in word, action, or appearance. If the mediator cannot conduct the mediation in an impartial manner, the mediator shall not serve.
- ~~1. A mediator shall be impartial and advise all parties of any circumstances bearing on possible bias, prejudice, or impartiality. Impartiality means freedom from favoritism or~~

~~bias in word, action, and appearance. Impartiality implies a commitment to aid all parties in moving toward an agreement.~~

2. A mediator should avoid the appearance of partiality, as viewed by the parties, at all times in providing mediation services. A mediator shall promptly disclose any facts, including any actual or potential conflicts of interest, that are known to the mediator and could reasonably be seen by the parties as creating an appearance of partiality. This is an ongoing duty.

~~2. A mediator shall avoid conduct which gives the appearance of partiality towards one of the parties. A mediator should guard against partiality or prejudice based on the parties personal characteristics, background, or performance at the mediation.~~

3. The parties may also raise, at any time, any concerns they may have regarding the appearance of partiality by the mediator.

~~3. If at any time the mediator is unable to conduct the process in an impartial manner, the mediator is obligated to withdraw.~~

4. After appropriate disclosure and discussion of any matters regarding the appearance of partiality on the part of the mediator, the mediator may proceed with the mediation, if the mediator and all parties agree. Otherwise, the mediator shall not serve.

Comments:

1. A mediator should not act from favoritism or bias based on any participant's personal characteristics, background, values, beliefs, or performance at a mediation, or any other reason.

2. Matters that may create an appearance of partiality include, but are not limited to: A mediator's involvement in, or opinions and beliefs about, the subject matter of the dispute. A mediator's known current, known past, or reasonably anticipated future relationship or affiliation, whether personal or professional, with any participant in the mediation process. (Service as a mediator in a mediation involving a party, attorney for a party, or other participant does not necessarily give rise to a relationship or affiliation requiring disclosure. In disclosing any services as a mediator, mediators should not reveal any confidential information about the prior mediation.)

3. A mediator should neither give nor accept a gift, favor, loan or other item of value that raises a question as to the mediator's actual impartiality or raises an appearance of partiality as viewed by the parties. However, a mediator may accept or give de minimis gifts or incidental items or services that are provided to facilitate a mediation or respect cultural norms so long as such practices do not raise questions as to a mediator's actual impartiality or raise an appearance of partiality as viewed by the parties.

4. Mediators should consider whether written or verbal disclosure is more appropriate, considering the situation requiring disclosure.

~~H. Conflicts of Interest~~

~~1. The mediator has a duty to remain free from conflict of interest that could in any way affect the ability of the mediator to conduct a neutral and balanced process.~~

~~2. A mediator must disclose any current, past, or possible future representation or relationship with any party or attorney involved in the mediation. Disclosure must also be made of any relevant financial interest. All disclosures shall be made as soon as possible after the mediator becomes aware of the interest or relationship.~~

~~3. After appropriate disclosure, the mediator may serve if the parties so desire.~~

HI.—Confidentiality

1. In order to inform the parties about confidentiality in mediation, the mediator shall use an Agreement to Mediate that contains the statutory language relating to confidentiality and any requirements for mandatory reporting that are applicable to the mediation. In such Agreement, the mediator and parties may also agree in writing to create any additional exceptions and confidentiality provisions that are not inconsistent with the Virginia Code. Any such additional exceptions or confidentiality provisions must be in writing and signed by the parties. The statutory language to be included from Section 8.01-581.22 is as follows:

All memoranda, work products and other materials contained in the case files of a mediator or mediation program are confidential. Any communication made in or in connection with the mediation, which relates to the controversy being mediated, including screening, intake, and scheduling a mediation, whether made to the mediator, mediation program staff, to a party, or to any other person, is confidential. However, a written mediated agreement signed by the parties shall not be confidential, unless the parties otherwise agree in writing.

Confidential materials and communications are not subject to disclosure in discovery or in any judicial or administrative proceeding except

- (i) where all parties to the mediation agree, in writing, to waive the confidentiality,
- (ii) in a subsequent action between the mediator or mediation program and a party to the mediation for damages arising out of the mediation,
- (iii) statements, memoranda, materials and other tangible evidence, otherwise subject to discovery, which were not prepared specifically for use in and actually used in the mediation,
- (iv) where a threat to inflict bodily injury is made,
- (v) where communications are intentionally used to plan, attempt to commit, or commit a crime or conceal an ongoing crime,
- (vi) where an ethics complaint is made against the mediator by a party to the mediation to the extent necessary for the complainant to prove misconduct and the mediator to defend against such complaint,
- (vii) where communications are sought or offered to prove or disprove a claim or complaint of misconduct or malpractice filed against a party's legal representative based on conduct occurring during a mediation,
- (viii) where communications are sought or offered to prove or disprove any of the grounds listed in § 8.01-581.26 in a proceeding to vacate a mediated agreement, or
- (ix) as provided by law or rule.

2. The mediator should have a reasonable understanding of confidentiality in mediation.

3. The mediator shall promote understanding among the parties of the extent to which the mediator and the parties will maintain confidentiality.

4. If a mediator participates in teaching, research or evaluation of mediation, the

mediator shall protect the anonymity of the parties and abide by their reasonable expectations regarding confidentiality.

5. Unless expressly authorized by the disclosing party, the mediator may not disclose to either party information relating to the subject matter of the mediation provided to him in confidence by the other. (Virginia Code Section 8.01-581.24)

6. At the commencement of the orientation session and of any mediation, the mediator shall inform the parties of any mandatory reporting obligations of the mediator, such as the reporting of allegations of child abuse (See Virginia Code Section 63.2-1509) and any required reporting to the court in court-referred cases (see Virginia Code Section 8.01-576.9).

~~1. The mediator has the obligation, prior to the commencement of the mediation, to inform the parties of the following and to determine that the parties have a reasonable understanding thereof:~~

~~a) all memoranda, work products and other materials contained in the case files of a mediator or mediation program are confidential;~~

~~b) any communication made in or in connection with the mediation which relates to the controversy being mediated, including screening, intake and scheduling a dispute resolution proceeding, whether made to a mediator or dispute resolution program staff or a party, or to any other person, is confidential;~~

~~c) a mediated agreement signed by the parties shall not be confidential, unless the parties otherwise agree in writing;~~

~~d) allegations of child abuse are not confidential as mediators are mandatory reporters of such information;~~

~~e) in reporting on the outcome of the dispute resolution proceeding to the referring court, the neutral shall indicate whether an agreement was reached, the terms of the agreement if authorized by the parties, the fact that no agreement was reached, or the fact that the orientation session or mediation did not occur. The neutral shall not disclose information exchanged or observations regarding the conduct and demeanor of the parties and their counsel during the dispute resolution proceeding, unless the parties agree otherwise.~~

~~2. The mediator further has a duty to explain that confidential materials and communications are not subject to disclosure in discovery or in any judicial or administrative proceeding except:~~

~~a) where all parties to the mediation agree, in writing, to waive the confidentiality;~~

~~b) in a subsequent action between the mediator and a party to the mediation for damages arising out of the mediation;~~

~~e) statements, memoranda, materials and other tangible evidence, otherwise subject to discovery, which were not prepared specifically for use in and actually used in the mediation;~~

~~d) where a threat to inflict bodily injury is made;~~

~~e) where communications are intentionally used to plan, attempt to commit, or commit a crime or conceal an ongoing crime;~~

~~f) where an ethics complaint is made against the neutral by a party to the dispute resolution proceeding to the extent necessary for the complainant to prove misconduct and the neutral to defend against such complaint;~~

~~g) where communications are sought or offered to prove or disprove a claim or complaint of misconduct or malpractice filed against a party's legal representative based on conduct occurring during a mediation;~~

~~h) where communications are sought or offered to prove or disprove any of the grounds listed in Virginia Code § 8.01-576.12 in a proceeding to vacate a mediated agreement; or~~

~~i) as provided by law or rule.~~

~~3. If the mediator has established specific exceptions to the general rule of confidentiality, they must be disclosed to the parties at the start of the mediation. Consistent with the rules set out here, the parties must agree, in writing, to waive confidentiality with respect to those issues.~~

I.J. Agreement

1. The mediator has no vested interest in the outcome of the mediation; therefore, the mediator must encourage the parties to develop their own solution to the conflict. The mediator may suggest options for the parties to consider, only if the suggestions do not affect the parties' self-determination or the mediator's impartiality interfere with the mediator's impartiality or the self-determination of the parties. The mediator may not recommend particular solutions to any of the issues in dispute between the parties nor coerce the parties to reach an agreement on any or all of the issues being mediated.

2. Prior to the parties entering into a mediated agreement, the mediator ~~has the obligation to~~ shall encourage the parties to consider the meaning and ramifications of the agreement and the interests of any third parties. ~~determine that:~~

~~1. the parties have considered all that the agreement involves and the possible ramifications of the agreement;~~

~~2. the parties have also considered the interests of other persons who are not parties to the mediation but are affected by the agreement; and~~

~~3. the parties have entered into the agreement voluntarily.~~

3. The mediator shall encourage review of any agreement by independent counsel for each of the parties prior to the mediated agreement being signed by the parties.

4. If the mediator has concerns about the possible consequences of a proposed agreement or that any party does not fully understand the terms of the agreement or its consequences~~ramifications~~, the mediator may~~has the obligation to~~ raise these concerns with the parties and may withdraw from the mediation. ~~Under circumstances in which the mediator believes that manifest injustice would result if the agreement was signed as drafted, the mediator shall withdraw from the mediation prior to the agreement being signed.~~

JK. Level of Skill or Expertise

1. The mediator has the obligation to refuse a referral if he or she believes that the referral would require skill that would exceed his/her current level of expertise.

2. If a mediator determines during the course of a mediation that a lack of technical knowledge or skill impairs or is likely to impair the mediator's effectiveness, the mediator shall notify the parties and may withdraw of his own accord or if requested by any party.

KL. Quality of the Process

~~1. A mediator shall conduct the mediation diligently and shall not prolong the mediation for the purpose of charging a higher fee.~~ A mediator shall conduct a mediation in a manner that promotes diligence, timeliness, safety, procedural fairness, and mutual respect among all the participants. A mediator should agree to mediate only when the mediator is prepared to commit the attention essential to an effective mediation.

2. A mediator shall act consistently with all Virginia statutes governing mediation, mediators, and dispute resolution proceedings.

3. A mediator should promote honesty and candor between and among all participants.

~~4. If,~~ The mediator shall terminate the mediation when, in the mediator's judgment, the integrity of the process has been compromised ~~by,~~ for example, by inability or unwillingness of a party to participate meaningfully, gross inequality of bargaining power or ability, gross unfairness resulting from nondisclosure or fraud by a participant, ~~the mediator shall inform the parties. The mediator shall discontinue the mediation in such~~

~~circumstances, but shall not violate the obligation of confidentiality.~~ The mediator may explain the reason for the mediator's termination, so long as the explanation is consistent with the obligations arising under these Standards, including but not limited to the obligation of confidentiality.

5. Mediators shall conduct themselves in a manner that will instill confidence in the mediation process, confidence in the integrity and competence of mediators, and confidence that disputes entrusted to mediators are handled in accordance with the highest ethical standards and consistent with the proper administration of justice. For example, a mediator shall not:

a) commit a criminal or deliberately wrongful act that reflects adversely on the mediator's honesty, trustworthiness or fitness to provide mediation services, conduct mediation training programs, and/or mentor; or

b) engage in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the mediator's fitness to provide mediation services, to conduct mediation training programs, and/or to mentor; or

c) knowingly assist or induce another person to violate or attempt to violate the Standards of Ethics and Professional Responsibility for Certified Mediators.

M. Fees

1. A mediator shall fully disclose compensation, fees, and, charges to the parties.
2. A mediator shall not charge a contingent fee or fee based upon the outcome of the mediation because such a practice creates an appearance of impartiality.
3. A mediator shall not give or receive any commission or other monetary or non-monetary form of consideration in return for referral of parties ~~clients~~ for mediation services.

Comment: Section M.3. is not intended to preclude a dispute resolution organization or program from receiving a commission or consideration for acceptance of a case which it then refers to a member of the organization's panel of neutrals.

N. Advertising

A mediator shall be truthful in advertising, ~~and solicitation,~~ or other communication about the mediator's qualifications, experience, services and fees. ~~for mediation.~~

O. Community Service

The mediator is encouraged to provide pro bono or reduced fee services to the community, where appropriate.

OP. Additional Responsibilities

These Standards are not intended to be exclusive and do not in any way limit the responsibilities the mediator may have under codes of ethics or professional responsibility promulgated by any other profession to which the mediator belongs or any other code of ethics or professional responsibility to which the mediator subscribes, such as those promulgated by the ~~Society of Professionals in Dispute Resolution or the Academy of Family Mediators~~American Bar Association, the Association for Conflict Resolution or the American Arbitration Association. However, where these Standards and another code of ethics or professional responsibility conflict, these Standards take precedence.