

# Model Standards of Conduct for Mediators

**American Arbitration Association**  
(Adopted September 8, 2005)

**American Bar Association**  
(Adopted August 9, 2005)

**Association for Conflict Resolution**  
(Adopted August 22, 2005)

The Model Standards of Conduct for Mediators was prepared in 1994 by the American Arbitration Association, the American Bar Association's Section of Dispute Resolution, and the Association for Conflict Resolution<sup>1</sup>. A joint committee consisting of representatives from the same successor organizations revised the Model Standards in 2005.<sup>2</sup> Both the original 1994 version and the 2005 revision have been approved by each participating organization.<sup>3</sup>

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*The nine standards adopted by ACR/ABA/AAA are followed by comments posted online by representatives of the ACR sections and the ABA. The comments are slightly edited to eliminate language that is duplicated in the body of the standards. Appended to the standards are all of the online comments, unedited. The goal of the commentary process has not been to rewrite the standards. Rather, the goal has been to offer an opportunity for various practitioners to add depth or clarity to the standards, and to account for changes since the standards were adopted over a decade ago.*

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<sup>1</sup> The Association for Conflict Resolution is a merged organization of the Academy of Family Mediators, the Conflict Resolution Education Network and the Society of Professionals in Dispute Resolution (SPIDR). SPIDR was the third participating organization in the development of the 1994 Standards.

<sup>2</sup> Reporter's Notes, which are not part of these Standards and therefore have not been specifically approved by any of the organizations, provide commentary regarding these revisions.

<sup>3</sup> The 2005 revisions to the Model Standards were approved by the American Bar Association's House of Delegates on August 9, 2005, the Board of the Association for Conflict Resolution on August 22, 2005 and the Executive Committee of the American Arbitration Association on September 8, 2005.

## **Preamble**

Mediation is used to resolve a broad range of conflicts within a variety of settings. These Standards are designed to serve as fundamental ethical guidelines for persons mediating in all practice contexts. They serve three primary goals: to guide the conduct of mediators; to inform the mediating parties; and to promote public confidence in mediation as a process for resolving disputes.

Mediation is a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision-making by the parties to the dispute.

Mediation serves various purposes, including providing the opportunity for parties to define and clarify issues, understand different perspectives, identify interests, explore and assess possible solutions, and reach mutually satisfactory agreements, when desired.

## **Note on Construction**

These Standards are to be read and construed in their entirety. There is no priority significance attached to the sequence in which the Standards appear.

The use of the term “shall” in a Standard indicates that the mediator must follow the practice described. The use of the term “should” indicates that the practice described in the standard is highly desirable, but not required, and is to be departed from only for very strong reasons and requires careful use of judgment and discretion. The use of the term “mediator” is understood to be inclusive so that it applies to co-mediator models.

These Standards do not include specific temporal parameters when referencing a mediation, and therefore, do not define the exact beginning or ending of a mediation.

Various aspects of a mediation, including some matters covered by these Standards, may also be affected by applicable law, court rules, regulations, other applicable professional rules, mediation rules to which the parties have agreed and other agreements of the parties. These sources may create conflicts with, and may take precedence over, these Standards. However, a mediator should make every effort to comply with the spirit and intent of these Standards in resolving such conflicts. This effort should include honoring all remaining Standards not in conflict with these other sources.

These Standards, unless and until adopted by a court or other regulatory authority do not have the force of law. Nonetheless, the fact that these Standards have been adopted by the respective sponsoring entities should alert mediators to the fact that the Standards might be viewed as establishing a standard of care for mediators.

## STANDARD I. SELF-DETERMINATION

A. A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, un-coerced decision in which each party makes free and informed choices as to process and outcome. Parties may exercise self-determination at any stage of a mediation session, including mediator selection, process design, participation in or withdrawal from the process, and outcomes.

1. Although party self-determination for process design is a fundamental principle of mediation practice, a mediator may need to balance such party self-determination with a mediator's duty to conduct a quality process in accordance with these Standards.

2. A mediator cannot personally ensure that each party has made free and informed choices to reach particular decisions, but, where appropriate, a mediator should make the parties aware of the importance of consulting other professionals to help them make informed choices.

B. A mediator shall not undermine party self-determination by any party for reasons such as higher settlement rates, egos, increased fees, or outside pressures from court personnel, program administrators, provider organizations, the media or others.

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### Standard I Comments

#### From Education, Research, and Training

- While party self-determination for participation in the mediation process is a fundamental principle of mediation, a mediator will work to balance party self-determination with a mediator's duty to conduct a quality process in accordance with these Standards.
- Although all efforts are made toward self-determination, a mediator cannot guarantee free and informed decision-making. To this end, a mediator shall make the parties aware of the importance of informed decisions and will provide guidance to obtain third-party/legal review of all agreements made in the mediation setting.

#### From ODR

- The introduction of ICT into the process of mediation introduces the concept of 'computer literacy' and the capacity to understand the implications of using or not using ICT as part of the mediation process. If the parties are able to exercise self-determination in process design, it is imperative that the third party be able to describe the use of ICT or the decision not to use ICT, in a way that is understandable to the parties, both in terms of process and in terms of potential impact on the outcome of mediation.
- The mediator should not avoid the use of ICT because of a personal bias or proclivity, and should not press the use of ICT as a result of the mediator's personal preference.

- The decision to use an ICT platform for which the mediator has paid to purchase or for which he or she is paying an ongoing fee, risks the perception of bias. If the mediator charges parties any cost or fee to use an ICT platform, that fact may affect a party's decision to engage in ODR, and therefore should be disclosed.

## STANDARD II. IMPARTIALITY

- A. A mediator shall decline to mediate if the mediator cannot conduct it in an impartial manner. Impartiality means freedom from favoritism, bias or prejudice.
- B. A mediator shall conduct a mediation session in an impartial manner and avoid conduct that gives the appearance of partiality.
1. A mediator should not act with partiality or prejudice based on any participant's personal characteristics, background, values and beliefs, or performance at a mediation, or any other reason.
  2. 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 or perceived impartiality.
  3. 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 or perceived impartiality.
- C. If at any time a mediator is unable to conduct a mediation session in an impartial manner, the mediator shall withdraw.
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### Standard II Comments

#### From Education, Research, and Training

- A mediator shall avoid language and conduct that gives the appearance of partiality.
- If at any stage of the mediation process, the mediator identifies that he or she cannot conduct the mediation in an impartial manner, or is notified in writing by a participant that the mediation has not been conducted in an impartial manner, the mediator will withdraw from the mediation.
- Should the claim of partiality by a participant be determined to be unfounded by the governing administrative body or court, the mediator may be reappointed.

#### From Commercial

- Any participation on social media platforms should be conducted in a manner that does not create an appearance of impartiality of the mediator.

#### From ODR

- The fourth party and the program designers for ODR/ICT have an obligation to design platforms and systems that do not demonstrate bias toward users with advanced or limited computer literacy skills, and perhaps more importantly, that do not build in culturally specific assumptions. Developers and designers should have an obligation to create fourth party applications that are as flexible as the third party can be in a traditional face-to-face session. With the foregoing in mind, the mediator has an obligation to select an appropriate ODR/ICT platform that meets the needs of the parties in an evenhanded manner.

- Just as a mediator may show overt or unintended bias toward a party due to clearly observable cultural signs or expressed opinions, or ability to use ICT, the mediator may show bias toward a party who does or does not agree with the mediator's bias regarding the use of ICT for mediation.
- A mediator should confirm each participant's level of comfort with, and ability to perform using, ICT prior to engaging in ODR and remain free from favoritism, bias, or prejudice regarding a party's performance using ICT.

### STANDARD III. CONFLICTS OF INTEREST

- A. A mediator shall avoid a conflict of interest or the appearance of a conflict of interest during and after a mediation session. A conflict of interest can arise from involvement by a mediator with the subject matter of the dispute or from any relationship between a mediator and any mediation participant, whether past or present, personal or professional, that reasonably raises a question of a mediator's impartiality.
- B. A mediator shall make a reasonable inquiry to determine whether there are any facts that a reasonable individual would consider likely to create a potential or actual conflict of interest for a mediator. A mediator's actions necessary to accomplish a reasonable inquiry into potential conflicts of interest may vary based on practice context.
- C. A mediator shall disclose, as soon as practicable, all actual and potential conflicts of interest that are reasonably known to the mediator and could reasonably be seen as raising a question about the mediator's impartiality. After disclosure, if all parties agree, the mediator may proceed with the mediation.
- D. If a mediator learns any fact after accepting a mediation that raises a question with respect to that mediator's service creating a potential or actual conflict of interest, the mediator shall disclose it as quickly as practicable. After disclosure, if all parties agree, the mediator may proceed with the mediation.
- E. If a mediator's conflict of interest might reasonably be viewed as undermining the integrity of the mediation, a mediator shall withdraw from or decline to proceed with the mediation regardless of the expressed desire or agreement of the parties to the contrary.
- F. Subsequent to a mediation, a mediator shall not establish another relationship with any of the participants in any matter that would raise questions about the integrity of the mediation. When a mediator develops personal or professional relationships with parties, other individuals or organizations following a mediation in which they were involved, the mediator should consider factors such as time elapsed following the mediation, the nature of the relationships established, and services offered when determining whether the relationships might create a perceived or actual conflict of interest.

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#### Standard III Comments

##### From Education, Research, and Training

- Should a mediator consciously cultivate a personal or professional relationship with a previous mediation participant, involved individuals or organizations with which they were involved as a mediator, the mediator should consider her or his role as a mediator, time elapsed following the mediation, the nature of the relationship established with the participants, and the new services being offered when deciding whether the new involvement could create a perceived or actual conflict of interest on previous, current, or future work with any or all of the parties involved.

##### From ODR

- A mediator's relationship with a fourth party or a designer/provider could result in a conflict of interest or the perception of a conflict of interest and should be disclosed.
- A mediator's use of ICT outside the mediation session may create the perception of a conflict of interest. For example, postings on social media sites where "friends" are identified or where messages regarding the mediator's practice may be posted can create the impression of

relationships and interests that could be perceived by one or more of the parties as biased or prejudicial.

- Practitioners who choose to use social media should do so in a manner that is reasonably likely to maintain the integrity of mediation consistent with these Standards..
- Disclosure should include information about any platform, system, or company in which the mediator has invested, or for which the mediator has been in a consulting or advisory relationship. Disclosure should also include any ICT/ODR platforms for which the mediator has an ongoing financial responsibility (license fee or purchase cost).

## STANDARD IV. COMPETENCE

A. A mediator shall mediate only when the mediator has the necessary competence to satisfy the reasonable expectations of the parties.

1. Any person may be selected as a mediator, provided that the parties are satisfied with the mediator's competence and qualifications. Training, experience in mediation, skills, cultural understandings and other qualities are often necessary for mediator competence. A person who offers to serve as a mediator creates the expectation that the person is competent to mediate effectively.

2. A mediator should attend educational programs and related activities to maintain and enhance the mediator's knowledge and skills related to mediation.

3. A mediator should have available for the parties' information relevant to the mediator's training, education, experience and approach to conducting a mediation.

B. If a mediator, during the course of a mediation determines that the mediator cannot conduct the mediation competently, the mediator shall discuss that determination with the parties as soon as is practicable and take appropriate steps to address the situation, including, but not limited to, withdrawing or requesting appropriate assistance.

C. If a mediator's ability to conduct a mediation session is impaired by drugs, alcohol, medication or otherwise, the mediator shall not conduct the mediation.

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### Standard IV Comments

#### From Education, Research, and Training

- Training, experience in mediation, third-party neutral status, mediation process skills such as an understanding of interpersonal relationships and negotiation, communication skills, cultural understandings, and other qualities directly relevant to the context of the mediation, are often recognized in mediator competence. A person who offers to serve as a mediator creates the expectation that they are competent to mediate effectively.
- A mediator should attend educational programs and related activities to maintain and enhance the mediator's knowledge and skills relevant in mediation.
- A mediator shall have information relevant to the mediator's training, education, experience and approach to conducting a mediation available for the parties.

#### General Comment

- Consideration must be given to any need that potentially arises that would require special procedures for disputes that are outside regular jurisdictions such as cross-border disputes, parties who may be subject to a separate judicial system such as the Armed Forces Uniformed Code of Military Justice (UCMJ), or for parties that may be subject to lawfully classified communication restrictions. For example, in this last instance, a mediator shall be selected who holds, or can be granted, a security clearance appropriate to the dispute.

From ODR

- Mediators should attend trainings and other programs to prepare to enter the mediation field, and continuing education to enrich one's ability to mediate. The knowledge and skills related to mediation should include information about online dispute engagement, various ODR platforms, and information and communication technology.

## STANDARD V. CONFIDENTIALITY

- A. A mediator shall maintain the confidentiality of all information obtained by the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law.
1. If the parties to a mediation agree that the mediator may disclose information obtained during the mediation, the mediator may do so.
  2. A mediator should not communicate to any non-participant information about how the parties acted in the mediation. A mediator may report, if required, whether parties appeared at a scheduled mediation and whether or not the parties reached a resolution.
  3. If a mediator participates in teaching, research or evaluation of mediation, the mediator should protect the anonymity of the parties and abide by their reasonable expectations regarding confidentiality.
- B. A mediator who meets with any persons in private session during a mediation shall not convey directly or indirectly to any other person, any information that was obtained during that private session without the consent of the disclosing person.
- C. A mediator shall promote understanding among the parties of the extent to which the parties will maintain confidentiality of information they obtain in a mediation session.
- D. Depending on the circumstance of a mediation session, the parties may have varying expectations regarding confidentiality that a mediator should address. 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.

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### Standard V Comments

#### From Education, Research, and Training

- If the parties to a mediation agree that the mediator may disclose information obtained during the mediation, the mediator may do so. *Consent may be given in writing, or verbally as documented by the mediator.*
- A mediator *will* not communicate information *about comments, events, or actions of the parties* in the mediation to a non-participant *unless required by law or for the safety of those involved. When required by the supervising court or program*, a mediator may report whether parties appeared at a scheduled mediation and whether or not the parties reached a resolution.
- If a mediator participates in *mentoring, experiential learning*, research or evaluation of mediation, the mediator should protect the *privacy* of the parties and abide by their reasonable expectations regarding confidentiality.
- A mediator who meets with *a participant or involved party* in private session during a mediation *process, the mediator* shall not convey directly or indirectly to any other person, any information that was *conveyed* during that private session without the consent of the disclosing person *unless required by law or for the safety of those involved.*

- A mediator shall promote understanding among the parties of the extent to which the *mediator and the parties* will maintain confidentiality.
- The mediator shall address *confidentiality*. The parties may have varying expectations regarding confidentiality *and* may *either* make their own rules with respect to confidentiality *or agree to the practice of the mediator, the program, or the courts under which the mediation is being conducted*.

#### From ODR

- In order to assure confidentiality in the ODR process mediators must consider the concept of cyber intelligence and the increasing ease by which information can be gathered electronically and surreptitiously. It is important for the mediator to understand this possibility and employ reasonable security measures. In many ways the significance of the mediation will determine the appropriate security measures to be taken to maintain confidentiality. Basic security measures include:
  - Use the highest level of encryption available for Wi-Fi devices. Currently Wi-Fi Protected Access II (WPA2) is the most common with WPA3 forthcoming soon. Legacy encryption standards, such as Wired Equivalent Privacy (WEP) are now considered weak in terms of security and should not be used.
  - Keep each of your device's firmware up to date.
  - Neither the parties or the mediator should engage in the ODR process using unsecured Wi-Fi or public Wi-Fi without using a Virtual Private Network (VPN).
  - The mediator should ensure that parties understand the security and confidentiality risks of using a public computer terminal to conduct ODR.
  - It is the mediator's responsibility to ensure that ODR participants understand basic security protocols and have reasonable technical competence to maintain confidentiality such as that listed above.
  - It is the mediators responsibility to authenticate the identity of all parties to the mediation.
  - Multifactor authentication conventions should be considered.
  - A means should exist to foster an enforceable commitment to process confidentiality by all participating parties, such as using confidentiality and security agreements when appropriate.
  - A reasonable expectation of privacy exist in a mediation forum and no party shall record an ODR session by audio or video without the explicit consent of all parties.
  - Any existing Data Protection Acts and the like should restrict "domestic purpose" exemptions that would otherwise permit the lawful gathering and discovery of family and household personal data that is pertinent to the parties involved in the dispute. For example, a spouse may not "hack" an opposing spouses device, data, or confidential communications.
- This is, perhaps, the most difficult standard with which to deal regarding the mediator's knowledge and practice. There are certain steps that apply specifically to ODR that are basic and which should be integrated into the rules:
  - The mediator should make himself or herself aware of the security standards used by any online platform that will pass through or hold information generated by the parties and the mediator during a mediation session.
  - The mediator should educate herself or himself on the basics of computer security, including the security protocols used by online providers, and including the stated "ownership" of information passed through the online channel.

- The mediator should be able to explain, in language the parties can understand, the perceived and actual risks to privacy and confidentiality inherent in using online or computer-based platforms or applications.
- The mediator should avoid using or recommending online or computer-based platforms or applications that do not meet reasonable industry standards for security and privacy protection.
- Before beginning mediation, the mediator should create a protocol agreement that spells out the parties' understanding of the process, any ODR technology to be used, the actual risks to their information, and the responsibility of the mediator as it relates to confidentiality and the ability to shield online data from discovery.

## STANDARD VI. QUALITY OF THE PROCESS

A. A mediator shall conduct mediation in accordance with these Standards and in a manner that promotes diligence, timeliness, safety, presence of the appropriate participants, party participation, procedural fairness, party competency and mutual respect among all participants.

1. A mediator should agree to mediate only when the mediator is prepared to commit the attention essential to an effective mediation.
2. A mediator should only accept cases when the mediator can satisfy the reasonable expectation of the parties concerning the timing of a mediation.
3. The presence or absence of persons at a mediation depends on the agreement of the parties and the mediator. The parties and mediator may agree that others may be excluded from particular sessions or from all sessions.
4. A mediator should promote honesty and candor between and among all participants, and a mediator shall not knowingly misrepresent any material fact or circumstance in the course of a mediation.
5. The role of a mediator differs substantially from other professional roles. Mixing the role of a mediator and the role of another profession is problematic and thus, a mediator should distinguish between the roles. A mediator may provide information that the mediator is qualified by training or experience to provide, only if the mediator can do so consistent with these Standards.
6. A mediator shall not conduct a dispute resolution procedure other than mediation but label it mediation in an effort to gain the protection of rules, statutes, or other governing authorities pertaining to mediation.
7. A mediator may recommend, when appropriate, that parties consider resolving their dispute through arbitration, counseling, neutral evaluation or other processes.
8. A mediator shall not undertake an additional dispute resolution role in the same matter without the consent of the parties. Before providing such service, a mediator shall inform the parties of the implications of the change in process and obtain their consent to the change. A mediator who undertakes such role assumes different duties and responsibilities that may be governed by other standards.
9. If a mediation is being used to further criminal conduct, a mediator should take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.

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### Standard VI Comments

#### From Education, Research, and Training

- A mediator shall conduct a mediation in accordance with these Standards and in a manner that promotes diligence, timeliness, safety, presence *and participation* of the appropriate participants, procedural fairness, competence and mutual respect among all participants.
- A mediator should agree to mediate only *if* the mediator is prepared to commit the *time and attention necessary to be effective and thoroughly complete* a mediation.

- A mediator should only accept cases when the mediator can satisfy the reasonable expectation of the parties concerning the timing *and procedure* of a mediation.
- The presence or absence of *individuals in* mediation depends on the agreement of the parties and the mediator. The parties and mediator may agree that others may be *included or* excluded from particular sessions or from all sessions.
- *The use or absence of an established process, procedure, administrative task, or interview to assist or enhance the quality of a mediation will be decided by agreement of the parties and of the mediator.*
- A mediator should promote honesty and candor between and among all participants. *A mediator must not knowingly misrepresent information, material fact, circumstance, or their own role* in the course of a mediation.
- The role of a mediator differs substantially from other *similar* Mixing the role of a mediator and another profession *or dispute resolving role can be unclear to the parties and supervising bodies* and thus, a mediator *must clearly* distinguish between roles. A mediator may act in the role of a mediator only if they can do so *in a manner consistent* with these Standards.
- A mediator shall not conduct a dispute resolution procedure other than mediation but label it mediation in an effort to gain the protection of *the* rules, statutes, or other governing authorities pertaining to mediation.
- A mediator shall not undertake an additional dispute resolution role without the consent of the parties. Before providing such service, a mediator shall inform the parties of the implications of the change in process and obtain their consent to the change *before executing the alternate resolution process.*
- A mediator may provide information *about each role* that the mediator is qualified *for* by training and experience and must obtain consent to provide each service, one separated from the other by time, manner, and acknowledgement of the parties and by the professional. *One who acts in a role not consistent with standard mediation practices assumes different duties and responsibilities that are governed by other standards and therefore cannot be considered to be acting in the role of a*
- A mediator may recommend, when appropriate, that parties consider resolving their dispute through arbitration, counseling, neutral evaluation or other processes *approved by the supervising court or administrative body.*
- If mediation is being used *by a participant or agent to advance or promote* criminal conduct, a mediator *must* take appropriate steps including, *as necessary,* postponing, withdrawing from, or terminating the mediation *and reporting safety concerns to appropriate authorities.*
- If a party appears to have difficulty comprehending the process, issues, or settlement options, or *has* difficulty participating in a mediation *effectively,* the mediator should explore the circumstances and accommodations that *will* make that party's *capacity to exercise self-determination, comprehend and participate in the mediation in a manner equitable to others in the mediation.*
- If a mediator is made aware of abuse or violence among the parties, the mediator shall take appropriate steps including, if necessary, postponing, withdrawing from, or terminating the mediation *and reporting safety concerns to appropriate authorities.*

- If a mediator believes that the conduct of a participant or *contributor*, including that of the mediator, will jeopardize *the effectiveness of* a mediation consistent with these Standards, a mediator shall take appropriate steps to postpone, withdraw from or terminate the mediation.

#### General Comment

- Communications Security (COMSEC) and Information Security (INFOSEC) both demand due consideration by platform designers, awareness by ODR providers and a degree of duty by participating parties.
  - ODR providers should endeavor to stay current on issues of COMSEC vulnerabilities and work proactively to mitigate security risks.
  - Platform designers should keep the principle of simplicity in mind and design for parties who may be digitally disadvantaged, digitally excluded, or those who live with medical conditions such as brain injuries.
  - Platform designers should keep the principle of simplicity in mind and design for parties who may be digitally disadvantaged or digitally excluded as understood by a Report of JUSTICE (*Preventing Digital Exclusion from Online Justice*).
  - The disposition of any electronic records, stored, residual or otherwise, warrant the implementation of defined standard procedures in accordance with ADR industry standards and must remain within other applicable regulatory compliance such as HIPAA.
  - Mediators should be familiar with the privacy policy of their Virtual Private Network (VPN) and know if the VPN provider keeps connections logs (such as metadata), usage/activity logs (such as downloaded files) and its expectation of privacy (such as reporting activity to law enforcement). Privacy-consciousness is a legitimate concern in any mediation.

## STANDARD VII. ADVERTISING AND SOLICITATION

- A. A mediator shall be truthful and not misleading when advertising, soliciting or otherwise communicating the mediator's qualifications, experience, services and fees.
1. A mediator should not include any promises as to outcome in communications, including business cards, stationery, or computer-based communications.
  2. A mediator should only claim to meet the mediator qualifications of a governmental entity or private organization if that entity or organization has a recognized procedure for qualifying mediators and it grants such status to the mediator.
- B. A mediator shall not solicit in a manner that gives an appearance of partiality for or against a party or otherwise undermines the integrity of the process.
- C. A mediator shall not communicate to others, in promotional materials or through other forms of communication, the names of persons served without their permission.
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### Standard VII Comments

#### From Education, Research, and Training

- A mediator shall not *be* misleading when advertising, soliciting or otherwise communicating the mediator's qualifications, experience, services and fees.
- A mediator should not include promises as to the outcomes *of mediation* in communications, including business cards, stationery, or computer-based communications.
- A mediator should claim only *recognized* qualifications of a government entity or organization if that entity has a procedure for qualifying mediators and has granted such status to *that* mediator.
- A mediator shall not solicit *participation in mediation* in a manner that gives an appearance of partiality or otherwise undermines the integrity of the process.
- A mediator shall not disclose the names *of mediation participants* in promotional materials or through other forms of communication without *the participant's expressed* permission.

## STANDARD VIII. FEES AND OTHER CHARGES

- A. A mediator shall provide each party or each party's representative true and complete information about mediation fees, expenses and any other actual or potential charges that may be incurred in connection with a mediation.
1. If a mediator charges fees, the mediator should develop them in light of all relevant factors, including the type and complexity of the matter, the qualifications of the mediator, the time required and the rates customary for such mediation services.
  2. A mediator's fee arrangement should be in writing unless the parties request otherwise.
- B. A mediator shall not charge fees in a manner that impairs a mediator's impartiality.
1. A mediator should not enter into a fee agreement which is contingent upon the result of the mediation or amount of the settlement.
  2. While a mediator may accept unequal fee payments from the parties, a mediator should not use fee arrangements that adversely impact the mediator's ability to conduct a mediation in an impartial manner.

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### Standard VIII Comments

#### From Education, Research, and Training

- A mediator shall provide each party or each party's representative *thorough* information about mediation fees, expenses and any other actual or potential charges that may be incurred in connection with a mediation.
- *When* a mediator charges fees, the mediator should *define their* fees in light of all relevant factors, including the type and complexity of the matter, the qualifications of the mediator, the time required and the rates customary for such mediation services.
- A mediator's fee arrangement should be in writing unless the parties request otherwise.
- A mediator shall not charge fees in a manner that *may jeopardize* a mediator's impartiality.
- A mediator should not enter into a fee agreement which is contingent upon the result of the mediation or amount of the settlement.
- While a mediator may accept disproportionate fee payments from *each of* the parties, fee arrangements *must not* impact the mediator's ability to conduct a mediation in an impartial manner.

#### From ODR

- If there are special costs or fees associated with the use of an online platform, or if the use of the platform is handled as a separate item, disclosure of costs and any other ramifications of signing up for a platform should be disclosed.

## STANDARD IX. ADVANCEMENT OF MEDIATION PRACTICE

A. A mediator should act in a manner that advances the practice of mediation. A mediator promotes this Standard by engaging in some or all of the following:

1. Fostering diversity within the field of mediation.
2. Striving to make mediation accessible to those who elect to use it, including providing services at a reduced rate or on a pro bono basis as appropriate.
3. Participating in research when given the opportunity, including obtaining participant feedback when appropriate.
4. Participating in outreach and education efforts to assist the public in developing an improved understanding of, and appreciation for, mediation.
5. Assisting newer mediators through training, mentoring and networking.

B. A mediator should demonstrate respect for differing points of view within the field, seek to learn from other mediators and work together with other mediators to improve the profession and better serve people in conflict.

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### Standard IX Comments

#### From Education, Research, and Training

- A mediator should act in a manner that advances the practice of mediation. A mediator promotes this Standard by engaging in some or all of the following:
  - *Contributing to the maturity of new and developing mediators and the mediation practice itself through practice and skills advancements, training, research, mentoring and collaboration.*
  - A mediator should demonstrate respect for differing points of view within the field, seek to learn from other mediators and work together with other mediators *and associations* to improve the profession and better serve the *resolution of disputes*.

#### From ODR

- In order to advance the practice of mediation it is necessary to first recognize and admit the inevitable nature of the use of ODR technology, and second to engage in meaningful discussions about the way in which the technology should be further integrated into the practice of mediation.

### **Possible STANDARD X: Fourth Parties, Designers, Programmers, and Service Providers**

If it is true that ODR technology is the “fourth party” it may be necessary to establish standards of practice or model rules that go beyond the primary parties and the third party/mediator. Some of the issues related to these rules may be as follows:

#### Fourth Party

- Ease of access
- Ease of use
- Not culturally biased
- Not expensive or inaccessible to low income parties
- Stable and reliable
- Secure and capable of ensuring confidentiality

#### Designers/Programmers

- Knowledge of the mediation process (and other dispute engagement modes)
- Knowledge of the standards and rules for third parties
- Strong “user experience” skills

#### Service Providers

- High levels of data security
- History of ethical business practice
- Acknowledgement of mediation/dispute engagement special requirements
- Commitment to maintaining confidentiality<sup>4</sup>

A basic question for mediators using fourth (and fifth, etc.) parties has a parallel in the practice of law. It is the case that actions of “agents” of an attorney (paralegals, investigators, etc.) are the responsibility of the attorney. Is the relationship between the mediator and the fourth party similar? Can the mediator be held responsible for data/confidentiality breaches or other actions that could be perceived as harmful to the parties?

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<sup>4</sup>In some cases it may not be clear that mediator confidentiality transfers to the service provider. For example, if a party approaches the mediator with a discovery order or a request for information and the mediator prevails due to confidentiality provisions in her or his locale, is it possible for the requesting party to in turn seek to retrieve information from an online service provider who may or may not be afforded the same confidentiality protection as the mediator?

## **UNEDITED COMMENTS**

### **Standard 1: Self-Determination**

#### **Education, Research, and Training**

A. A mediator shall mediate in a way that maintains party self-determination. Self-determination is the act of coming to a voluntary, uncoerced result in which each party makes free and informed choices toward settlements and outcomes. Parties can exercise self-determination throughout mediation, including mediator selection, information shared in mediation, participation in or withdrawal from the mediation process, agreements and outcomes developed in mediation.

1. While party self-determination for participation in the mediation process is a fundamental principle of mediation, a mediator will work to balance party self-determination with a mediator's duty to conduct a quality process in accordance with these Standards.

2. Although all efforts are made toward self-determination, a mediator cannot guarantee free and informed decision-making. To this end, a mediator shall make the parties aware of the importance of informed decisions and will provide guidance to obtain third-party / legal review of all agreements made in the mediation setting.

B. A mediator shall not undermine party self-determination for any reason, including settlement rates, self-image, and justification of fees, pressures from court personnel, other parties, program administrators, other provider organizations, the media, or others.

### **Standard 2: Impartiality**

#### **Education, Research, and Training**

A. A mediator shall decline or withdraw from a mediation if the mediator cannot conduct it in an impartial manner. Impartiality means freedom from favoritism, bias or partisanship.

1. A mediator shall avoid language and conduct that gives the appearance of partiality.

2. A mediator shall not act with partiality or prejudice regarding a participant's personal characteristics, background, values, beliefs, performance, or for any other reason during a mediation,

B. 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 or perceived impartiality.

3. A mediator may accept or give minor or trivial gifts or incidental items or services of no commercial value if provided as a tool to facilitate a mediation or respect cultural norms so long as such gifts or practices do not raise concern regarding the mediator's actual or perceived impartiality.

C. If at any stage of the mediation process, the mediator identifies that they cannot conduct the mediation in an impartial manner, or is notified in writing by a

participant that they have not conducted the mediation in an impartial manner, the mediator will withdraw from the mediation.

1. Should the claim of partiality by a participant be determined to be unfounded by the governing administrative body or court, the mediator may be reappointed.

## **Commercial**

Any participation on social media platforms should only be conducted in a manner that does not create an appearance of impartiality of the mediator.

### **Standard 3: Conflicts of Interest**

#### **Education, Research, and Training**

A. A mediator shall avoid the appearance of a conflict of interest or actual conflict of interest during and after a mediation. A conflict of interest can arise from involvement by a mediator with the participants or subject of the dispute whether past or present, personal or professional. This includes any transaction, relation or contract relationship regarding a participant or the subject matter being mediated that reasonably raises a question of impartiality.

B. A mediator shall make inquiry to determine whether there are any details that a reasonable individual would consider likely to create a conflict of interest for the mediator. A mediator's actions necessary to accomplish a reasonable inquiry into potential conflicts of interest may vary.

C. A mediator shall disclose, as soon as possible, all actual and potential conflicts of interest that become known to the mediator before, during, or after the mediation. Upon disclosure, if all parties agree, the mediator may proceed or continue with the mediation.

D. If a mediator's conflict of interest might reasonably be viewed as undermining the integrity of the mediation, a mediator shall withdraw from or decline to proceed with the mediation regardless of the expressed desire or agreement of the parties to the contrary.

E. If a mediator learns of any details after completing a mediation that raises a question with respect to that mediator's service having been performed during, or resulting in a potential or actual conflict of interest, the mediator shall disclose it to the parties. Any results of a completed mediation such as agreement or recommendation will stand unless all involved parties avow in writing that the mediation and all results shall be declared as null and void.

F. Subsequent to a mediation, a mediator shall not establish another relationship with any of the participants in any matter that would raise questions about the integrity of a past mediation.

1. Should a mediator consciously cultivate a personal or professional relationship with a previous mediation participant, involved individuals or organizations with which they were involved as a mediator, the mediator should consider their role as a mediator, time elapsed following the mediation, the nature of the relationship established with the participants, and the new services being offered when

deciding whether the new involvement could create a perceived or actual conflict of interest on previous, current, or future work with any or all of the parties involved.

#### **Standard 4: Competence**

##### **Education, Research, and Training**

A. A mediator shall mediate only when the mediator has the competence to satisfy the reasonable expectations of the parties.

1. Training, experience in mediation, third-party neutral status, mediation process skills such as an understanding of interpersonal relationships and negotiation, communication skills, cultural understandings, and other qualities directly relevant to the context of the mediation, are often recognized in mediator competence. A person who offers to serve as a mediator creates the expectation that they are competent to mediate effectively.

2. A mediator should attend educational programs and related activities to maintain and enhance the mediator's knowledge and skills relevant in mediation.

3. A mediator shall have information relevant to the mediator's training, education, experience and approach to conducting a mediation available for the parties'.

B. If a mediator, during the course of a mediation determines that the mediator cannot conduct the mediation competently, the mediator shall discuss this with the parties as soon as is possible and take appropriate steps to address the situation, including, but not limited to, withdrawing or requesting appropriate assistance.

C. If a mediator's ability to conduct a mediation becomes impaired by conflict of interest, diverse ideals, health implications, drugs, alcohol, medication or other force, the mediator shall temporarily not conduct or completely withdraw from the mediation.

##### **General**

Consideration must be given to any need that potentially arises that would require special procedures for disputes that are outside regular jurisdictions such as cross-border disputes, parties who may be subject to a separate judicial system such as the Armed Forces Uniformed Code of Military Justice (UCMJ), or for parties that may be subject to lawfully classified communication restrictions. For example, in this last instance, a mediator shall be selected who holds, or can be granted, a security clearance appropriate to the dispute.

#### **Standard 5: Confidentiality**

##### **Education, Research, and Training**

1. A mediator shall maintain confidentiality of all information *concerning* a mediation *unless* disclosure *is agreed to* by the parties or required by applicable law.
2. If the parties to a mediation agree that the mediator may disclose information obtained during the mediation, the mediator may do so. *Consent may be given in writing, or verbally as documented by the mediator.*
3. A mediator *will* not communicate information *about comments, events, or actions of the parties* in the mediation to a non-participant *unless required by law or for the safety of those involved.* When required by the *supervising court or program*, a mediator may report whether parties appeared at a scheduled mediation and whether or not the parties reached a resolution.
4. If a mediator participates in *mentoring, experiential learning*, research or evaluation of mediation, the mediator should protect the *privacy* of the parties and abide by their reasonable expectations regarding confidentiality.
5. A mediator who meets with *a participant or involved party* in private session during a mediation *process*, *the mediator* shall not convey directly or indirectly to any other person, any information that was *conveyed* during that private session without the consent of the disclosing person *unless required by law or for the safety of those involved.*
6. A mediator shall promote understanding among the parties of the extent to which the *mediator and the parties* will maintain confidentiality.
7. The mediator shall address *confidentiality.* The parties may have varying expectations regarding confidentiality *and may either* make their own rules with respect to confidentiality *or agree to the practice of the mediator, the program, or the courts under which the mediation is being conducted.*

## **ODR**

In order to assure confidentiality in the ODR process, those in our field must consider the concept of cyber intelligence and the increasing ease by which information can be gathered electronically and surreptitiously. Mediators, by the nature of their work, may be oriented toward empathy and lean toward trust in the parties. They may perhaps not be as acquainted with the same level of awareness as a party who might have the drive, creativity, and skills to utilize the tools of modern technology to breach confidentiality in order to intercept electronic communications, monitor private conversations, eavesdrop on an ODR caucus, or discover information from the documents or notes of the other party or mediator. This would of course create a substantial power imbalance that may be invisible to the mediator and other parties, and result in a considerably favorable position for the cheating party. It is important for the mediator to understand this possibility and employ reasonable security measures. In many ways the significance of the mediation will determine the appropriate security measures to be taken to maintain confidentiality. Basic security measures include:

1. Use the highest level of encryption available for Wi-Fi devices. Currently Wi-Fi Protected Access II (WPA2) is the most common with WPA3

- forthcoming soon. Legacy encryption standards, such as Wired Equivalent Privacy (WEP) are now considered weak in terms of security and should not be used.
2. Keep each of your device's firmware up to date.
  3. Neither the parties or the mediator should engage in the ODR process using unsecured Wi-Fi or public Wi-Fi without using a Virtual Private Network (VPN).
  4. The mediator should ensure that parties understand the security and confidentiality risks of using a public computer terminal to conduct ODR.
  5. It is the mediator's responsibility to ensure that ODR participants understand basic security protocols and have reasonable technical competence to maintain confidentiality such as that listed above.
  6. It is the mediators responsibility to authenticate the identity of all parties to the mediation.
  7. **Multifactor authentication conventions should be considered.**
  - 8.
  9. A means should exist to foster an enforceable commitment to process confidentiality by all participating parties, such as using confidentiality and security agreements when appropriate.
  10. A reasonable expectation of privacy exist in a mediation forum and no party shall record an ODR session by audio or video without the explicit consent of all parties.
  11. Any existing Data Protection Acts and the like should restrict "domestic purpose" exemptions that would otherwise permit the lawful gathering and discovery of family and household personal data that is pertinent to the parties involved in the dispute. For example, a spouse may not "hack" an opposing spouses device, data, or confidential communications.

## **Standard 6: Quality of the Process**

### **Education, Research, and Training**

1. A mediator shall conduct a mediation in accordance with these Standards and in a manner that promotes diligence, timeliness, safety, presence *and participation* of the appropriate participants, procedural fairness, competence and mutual respect among all participants.
2. A mediator should agree to mediate only *if* the mediator is prepared to commit the *time and attention necessary to be effective and thoroughly complete* a mediation.
3. A mediator should only accept cases when the mediator can satisfy the reasonable expectation of the parties concerning the timing *and procedure* of a mediation.
4. The presence or absence of *individuals in* mediation depends on the agreement of the parties and the mediator. The parties and mediator may

- agree that others may be *included or excluded* from particular sessions or from all sessions.
5. *The use or absence of an established process, procedure, administrative task, or interview to assist or enhance the quality of a mediation will be decided by agreement of the parties and of the mediator.*
  6. A mediator should promote honesty and candor between and among all participants. A mediator *must* not knowingly misrepresent information, material fact, circumstance, *or their own role* in the course of a mediation.
  7. The role of a mediator differs substantially from other *similar* Mixing the role of a mediator and another profession *or dispute resolving role can be unclear to the parties and supervising bodies* and thus, a mediator *must clearly* distinguish between roles. A mediator may act in the role of a mediator only if they can do so *in a manner consistent* with these Standards.
  8. A mediator shall not conduct a dispute resolution procedure other than mediation but label it mediation in an effort to gain the protection of *the* rules, statutes, or other governing authorities pertaining to mediation.
  9. A mediator shall not undertake an additional dispute resolution role without the consent of the parties. Before providing such service, a mediator shall inform the parties of the implications of the change in process and obtain their consent to the change *before executing the alternate resolution process.*
  10. A mediator may provide information *about each role that* the mediator is qualified *for* by training and experience and must obtain consent to provide each service, one separated from the other by time, manner, and acknowledgement of the parties and by the professional. *One who acts in a role not consistent with standard mediation practices assumes different duties and responsibilities that are governed by other standards and therefore cannot be considered to be acting in the role of a*
  11. A mediator may recommend, when appropriate, that parties consider resolving their dispute through arbitration, counseling, neutral evaluation or other processes *approved by the supervising court or administrative body.*
  12. If mediation is being used *by a participant or agent to advance or promote* criminal conduct, a mediator *must* take appropriate steps including, as necessary, postponing, withdrawing from, or terminating the mediation *and reporting safety concerns to appropriate authorities.*
  13. If a party appears to have difficulty comprehending the process, issues, or settlement options, or *has* difficulty participating in a mediation *effectively*, the mediator should explore the circumstances and accommodations that *will* make that party's *capacity to exercise self-determination, comprehend and participate in the mediation in a manner equitable to others in the mediation.*
  14. If a mediator is made aware of abuse or violence among the parties, the mediator shall take appropriate steps including, if necessary, postponing,

- withdrawing from, or terminating the mediation *and reporting safety concerns to appropriate authorities.*
15. If a mediator believes that the conduct of a participant or *contributor*, including that of the mediator, will jeopardize *the effectiveness of a mediation* consistent with these Standards, a mediator shall take appropriate steps to postpone, withdraw from or terminate the mediation.

## General

Communications Security (COMSEC) and Information Security (INFOSEC) both demand due consideration by platform designers, awareness by ODR providers and a degree of duty by participating parties.

1. ODR platform designers must give consideration to the pace of technology advances and the subsequent need for complementary ethical consideration.
2. ODR providers should endeavor to stay current on issues of COMSEC vulnerabilities and work proactively to mitigate security risks.
3. Platforms should operate on HTTPS connections or improved future security protocols.
4. Platform designers should keep the principle of simplicity in mind and design for parties who may be “digitally disadvantaged,” “digitally excluded,” or those who live with medical conditions such as brain injuries.
5. Platform designers should keep the principle of simplicity in mind and design for parties who may be “digitally disadvantaged” or “digitally excluded” as understood by a Report of JUSTICE (*Preventing Digital Exclusion from Online Justice*).
6. The disposition of any electronic records, stored, residual or otherwise, warrant the implementation of defined standard procedures in accordance with ADR industry standards and must remain within other applicable regulatory compliance such as HIPAA.
7. Cloud based servers do not necessarily have 4th amendment protection, therefore, mediators must understand the risk and encrypt files for the maximum confidentiality when storing files at rest in a cloud server.
8. Mediators should be familiar with the privacy policy of their Virtual Private Network (VPN) and know if the VPN provider keeps connections logs (such as metadata), usage/activity logs (such as downloaded files) and its expectation of privacy (such as reporting activity to law enforcement). Privacy-consciousness is a legitimate concern in any mediation.

## ODR

In order to assure confidentiality in the ODR process, those in our field must consider the concept of cyber intelligence and the increasing ease by which information can be gathered electronically and surreptitiously. Mediators, by the nature of their work, may be oriented toward empathy and lean toward trust in the parties. They may perhaps not be as acquainted with the same level of

awareness as a party who might have the drive, creativity, and skills to utilize the tools of modern technology to breach confidentiality in such areas as monitoring private conversations and intercepting electronic communications in order to eavesdrop on an online caucus, or discover information from the documents or notes of the other party or mediator. Such insight would of course create a substantial power imbalance that may be invisible to the mediator and other parties, and result in a considerably favorable position for the cheating party. It is important for the mediator to understand this possibility and employ reasonable security measures. In many ways the significance of the mediation will determine the appropriate security measures to be taken to maintain confidentiality. Also deserving consideration by the mediator may be any participants' lack of technical competence that would compromise confidentiality. For example, no parties should participate in ODR over unsecured or public wifi.

### **Standard 7: Advertising and Solicitation**

#### **Education, Research, and Training**

1. A mediator shall not *be* misleading when advertising, soliciting or otherwise communicating the mediator's qualifications, experience, services and fees.
2. A mediator should not include promises as to the outcomes of *mediation* in communications, including business cards, stationery, or computer-based communications.
3. A mediator should claim only *recognized* qualifications of a government entity or organization if that entity has a procedure for qualifying mediators and has granted such status to *that* mediator.
4. A mediator shall not solicit *participation in mediation* in a manner that gives an appearance of partiality or otherwise undermines the integrity of the process.
5. A mediator shall not disclose the names of *mediation participants* in promotional materials or through other forms of communication without *the participant's* expressed permission.

### **Standard 8: Fees and Other Charges**

#### **Education, Research, and Training**

1. A mediator shall provide each party or each party's representative *thorough* information about mediation fees, expenses and any other actual or potential charges that may be incurred in connection with a mediation.
2. *When* a mediator charges fees, the mediator should *define their* fees in light of all relevant factors, including the type and complexity of the matter, the qualifications of the mediator, the time required and the rates customary for such mediation services.

3. A mediator's fee arrangement should be in writing unless the parties request otherwise.
4. A mediator shall not charge fees in a manner that *may jeopardize* a mediator's impartiality.
5. A mediator should not enter into a fee agreement which is contingent upon the result of the mediation or amount of the settlement.
6. While a mediator may accept disproportionate fee payments from *each of* the parties, fee arrangements *must not* impact the mediator's ability to conduct a mediation in an impartial manner.

### **Standard 9: Advancement of Mediation Practice**

#### **Education, Research, and Training**

1. A mediator should act in a manner that advances the practice of mediation. A mediator promotes this Standard by engaging in some or all of the following:
  2. Fostering diversity within the field of mediation.
  3. Striving to make mediation accessible to those who elect to use it, including providing services at a reduced rate or on a pro bono basis as appropriate.
  4. Participating in research when given the opportunity, including obtaining participant feedback when appropriate.
  5. Participating in outreach and education efforts to assist the public in developing an improved understanding of, and appreciation for, mediation.
  6. *Contributing to the maturity of new and developing mediators and the mediation practice itself through practice and skills advancements, training, research, mentoring and collaboration.*
  7. A mediator should demonstrate respect for differing points of view within the field, seek to learn from other mediators and work together with other mediators *and associations* to improve the profession and better serve the *resolution of disputes*.