

APPENDIX A

Standards of Professional Conduct for Rule 31 Mediators

**FILED**

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- (1) Preamble
  - (a) Scope; Purpose. These rules are intended to instill and promote public confidence in the Alternative Dispute Resolution process under Rule 31 and to be a guide to neutrals serving under Rule 31. As with other forms of dispute resolution, mediation must be built on public understanding and confidence. Persons serving as mediators are responsible to the parties, the public, and the courts to conduct themselves in a manner which will merit that confidence. These rules apply to all mediators who participate in court-annexed mediation and are a guide to mediator conduct in discharging professional responsibilities in the mediation of court cases under Supreme Court Rule 31.
  - (b) Mediation. Mediation is an informal process in which a neutral person, called a mediator, conducts discussions among the disputing parties designed to enable them to reach a mutually acceptable agreement among themselves on all or any part of the issues in dispute.
  - (c) Mediator's Role. In mediation, decision-making authority rests with the parties. The role of the mediator 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.

(d) General Principles. Mediation is based on principles of communication, negotiation, facilitation, and problem-solving that emphasize:

- (1) the needs and interests of the participants;
- (2) fairness;
- (3) procedural flexibility;
- (4) privacy and confidentiality;
- (5) full disclosure; and
- (6) self-determination.

(2) General Standards and Qualifications

(a) General. Integrity, impartiality, and professional competence are essential qualifications of any mediator. Mediators shall adhere to the highest standards of integrity, impartiality, and professional competence in rendering their professional service.

(1) A mediator shall not accept any engagement, perform any service, or undertake any act which would compromise the mediator's integrity.

(2) A mediator shall maintain professional competence in mediation skills including but not limited to:

- (a) staying informed of and abiding by all statutes, rules, and administrative orders relevant to the practice of court-ordered mediation;
  - (b) continuing to meet the requirements of these rules; and
  - (c) regularly engaging in educational activities promoting professional growth.
- (3) A mediator shall decline appointment, withdraw, or request technical assistance when the mediator decides that a case is beyond the mediator's competence.
- (b) Concurrent Standards. Nothing herein shall replace, eliminate, or render inapplicable relevant ethical standards, not in conflict with these rules, which may be imposed upon any mediator by virtue of the mediator's professional calling.
- (3) Responsibilities to Courts. A mediator shall be candid, accurate, and fully responsive to a court concerning the mediator's qualifications, availability, and all other pertinent matters. A mediator shall observe all administrative policies, local rules of court, applicable procedural rules, and statutes. A mediator is responsible to the judiciary for the propriety of the mediator's activities and must observe judicial standards of fidelity and diligence. A mediator shall refrain from any activity which has the appearance of improperly influencing a court to secure placement on a roster or appointment to a case, including gifts or other inducements to court personnel.

(4) The Mediation Process

- (a) Orientation Session. On commencement of the mediation session, a mediator shall inform all parties that the process is consensual in nature, that the mediator is an impartial facilitator, and that the mediator may not impose or force any settlement on the parties.
- (b) Continuation of Mediation. A mediator shall not unnecessarily or inappropriately prolong a mediation session if it becomes apparent that the case is unsuitable for mediation or if one or more of the parties is unwilling or unable to participate in the mediation process in a meaningful manner.
- (c) Avoidance of Delays. A mediator shall plan a work schedule so that present and future commitments will be fulfilled in a timely manner. A mediator shall refrain from accepting appointments when it becomes apparent that completion of the mediation assignments accepted cannot be done in a timely fashion. A mediator shall perform the mediation services in a timely and expeditious fashion, avoiding delays wherever possible.

(5) Self-Determination

- (a) Parties' Right to Decide. A mediator shall assist the parties in reaching an informed and voluntary settlement. Decisions are to be made voluntarily by the parties themselves.
- (b) Prohibition of Mediator Coercion. A mediator shall not coerce or unfairly influence a party into a settlement agreement and shall not make substantive decisions for any party to a mediation process.

- (c) Prohibition of Misrepresentation. A mediator shall not intentionally nor knowingly misrepresent material facts or circumstances in the course of conducting a mediation.
  - (d) A Balanced Process. A mediator shall promote a balanced process and shall encourage the parties to conduct the mediation deliberations in a nonadversarial manner.
  - (e) Mutual Respect. A mediator shall promote mutual respect among the parties throughout the mediation process.
- (6) Impartiality
- (a) Impartiality. 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, as opposed to an individual party, in moving toward an agreement.
    - (1) A mediator shall maintain impartiality while raising questions for the parties to consider as to the reality, fairness, equity, and feasibility of proposed options for settlement.
    - (2) A mediator shall withdraw from mediation if the mediator believes the he or she can no longer be impartial.
    - (3) A mediator shall not give or accept a gift, request, favor, loan, or any other item of value to or from a party, attorney, or any other person involved in and arising from any mediation process.

(b) Conflicts of Interest and Relationships; Required Disclosures; Prohibitions

- (1) A mediator must disclose any current, past, or possible future representation or consulting relationship with any party or attorney involved in the mediation. Disclosure must also be made of any pertinent pecuniary interest. A such disclosures shall be made as soon as practical after the mediator becomes aware of the interest or the relationship.
- (2) A mediator must disclose to the parties or to the court involved any close personal relationship or other circumstance, in addition to those specifically mentioned earlier in these standards, which might reasonably raise a question as to the mediator's impartiality. All such disclosures shall be made as soon as practical after the mediator becomes aware of the interest or the relationship.
- (3) The burden of disclosure rests on the mediator. After appropriate disclosure, the mediator may serve if both parties so desire. If the mediator believes or perceives that there is a clear conflict of interest, he or she should withdraw, irrespective of the expressed desires of the parties.
- (4) A mediator shall not provide counseling or therapy to either party during the mediation process, nor shall a mediator who is a lawyer represent either party in any matter during the mediation.

(5) A mediator shall not use the mediation process to solicit, encourage, or otherwise incur future professional services with either party.

(7) Confidentiality

(a) Required. A mediator shall preserve and maintain the confidentiality of all mediation proceedings except where required by law to disclose information.

(b) When Disclosure Permitted. A mediator shall keep confidential from the other parties any information obtained in individual caucuses unless the party to the caucus permits disclosure.

(c) Records. A mediator shall maintain confidentiality in storing or disposing of records and shall render anonymous all identifying information when materials are used for research, training, or statistical compilations.

(8) Professional Advice

(a) Generally. A mediator shall not provide information the mediator is not qualified by training or experience to provide.

(b) Independent Legal Advice. When a mediator believes a party does not understand or appreciate how an agreement may adversely affect legal rights or obligations, the mediator shall advise the participants to seek independent legal counsel.

- (c) When Party Absent. If one of the parties is unable to participate in a mediation process for psychological or physical reasons, a mediator should postpone or cancel mediation until such time as all parties are able and willing to resume. Mediators may refer the parties to appropriate resources if necessary.
- (d) Personal Opinion. While a mediator may point out possible outcomes of the case, a mediator should not offer a firm opinion as to how the court in which the case has been filed will resolve the dispute.

(9) Fees and Expenses

- (a) General Requirements. A mediator occupies a position of trust with respect to the parties and the courts. In charging for services and expenses, the mediator must be governed by the same high standards of honor and integrity that apply to all other phases of the mediator's work. A mediator must endeavor to keep total charges for services and expenses reasonable and consistent with the nature of the case. If fees are charged, a mediator shall give a written explanation of the fees and related costs, including time and manner of payment, to the parties prior to the mediation. The explanation shall include:

- (1) the basis for and amount of charges, if any, for:
  - (a) mediation sessions;
  - (b) preparation for sessions;
  - (c) travel time;



- (d) postponement or cancellation of mediation sessions by the parties and the circumstances under which such charges will normally be assessed or waived;
    - (e) preparation of the parties' written mediation agreement;
    - (f) all other items billed by the mediator; and
  - (2) the parties' pro rata share of mediation fees and costs if previously determined by the court or agreed to by the parties.
- (b) Records. A mediator shall maintain adequate records to support charges for services and expenses and shall make an accounting to the parties or to the court upon request.
- (c) Referrals. No commissions, rebates, or similar remuneration shall be given or received by a mediator for referral of clients for mediation or related services.
- (d) Contingent Fees. A mediator shall not charge a contingent fee or base a fee in any manner on the outcome of the process.
- (e) Principles. A mediator should be guided by the following general principles:
- (1) Time charges for a mediation session should not be in excess of actual time spent or allocated for the session.
  - (2) Time charges for preparation should be not in excess of actual time spent.

- (3) Charges for expenses should be for expenses normally incurred and reimbursable in mediation cases and should not exceed actual expenses.
- (4) When time or expenses involve two (2) or more sets of parties on the same day or trip, such time and expense charges should be prorated appropriately.
- (5) A mediator may specify in advance a minimum charge for a mediation session without violating this rule.
- (6) When a mediator is contacted directly by the parties for mediation services, the mediator has a professional responsibility to respond to questions regarding fees by providing a copy of the basis for charges for fees and expenses.

(10) Concluding Mediation

(a) With Agreement

- (1) The mediator shall request that the terms of any agreement reached be memorialized appropriately and shall discuss with the participants the process for formalization and implementation of the agreement.
- (2) When the participants reach a partial agreement, the mediator shall discuss the procedures available to resolve the remaining issues.
- (3) The mediator shall not knowingly assist the parties in reaching an agreement which for reasons such as fraud, duress, overreaching

the absence of bargaining ability, or unconscionability would not be enforceable.

(b) Without Agreement

(1) Termination by Participants. The mediator shall not require a participant's further presence at a mediation conference when it is clear the participant desires to withdraw.

(2) Termination by Mediator. If the mediator believes that the participants are unable or unwilling to participate meaningfully in the process or that an agreement is unlikely, the mediator shall suspend or terminate the mediation. The mediator should not prolong unproductive discussions that would result in emotional and monetary costs to the participants. The mediator shall not continue to provide mediation services where there is a complete absence of bargaining ability.

(11) Training and Education

(a) Training. A mediator is obligated to acquire knowledge and training in the mediation process, including an understanding of appropriate professional ethics, standards, and responsibilities.

(b) Continuing Education. It is important that mediators continue their professional education throughout the period of their active service. A mediator shall be personally responsible for ongoing professional growth,

including participation in such continuing education as may be required by law.

(c) New Mediator Training. An experienced mediator should cooperate in the training of new mediators, including serving as a mentor.

(12) Advertising. All advertising by a mediator must represent honestly the services to be rendered. No claim of specific results or promises which imply favoritism to one side should be made for the purpose of obtaining business. A mediator shall make only accurate statements about the mediation process, its costs and benefits, and the mediator's qualifications.

(13) Relationships With Other Professionals

(a) The Responsibility of the Mediator Toward Other Mediators

(1) Relationship With Other Mediators. A mediator should not mediate any dispute that is being mediated by another mediator without first endeavoring to consult with the person or persons conducting such mediation.

(2) Co-Mediation. In those situations where more than one mediator is participating in a particular case, each mediator has a responsibility to keep the others informed of developments essential to a cooperative effort. The wishes of the parties supersede the interests of the mediators.

(b) Relationship With Other Professionals

- (1) Cooperation. A mediator should respect the relationship between mediation and other professional disciplines including law, accounting, mental health, and the social services and should promote cooperation between mediators and other professionals.
  - (2) Prohibited Agreements. A mediator shall not participate in offering or making a partnership or employment agreement that restricts the rights of a mediator to practice after termination of the relationship, except an agreement concerning benefits upon retirement.
- (14) Advancement of Mediation
- (a) Pro Bono Service. Mediators have a professional responsibility to provide competent services to persons seeking their assistance, including those unable to pay for such services. As a means of meeting the needs of the financially disadvantaged, a mediator should provide mediation services pro bono or at a reduced rate of compensation whenever appropriate.
  - (b) Support of Mediation. A mediator should support the advancement of mediation by encouraging and participating in research, evaluation, or other forms of professional development and public education.