

## REPORTER'S NOTES

April 10, 2005

### I. Introduction

During the 1992-94 period, representatives from the American Arbitration Association, the American Bar Association's Section of Dispute Resolution, and the Association for Conflict Resolution<sup>1</sup> developed the Model Standards of Conduct for Mediators (hereinafter referred to as 1994 Version). These Standards had three stated functions: to serve as a guide for the conduct of mediators; to inform the mediating parties; and to promote public confidence in mediation as a process for resolving disputes.

The 1994 Version has performed these functions with remarkable success. Two salient signs of such success are that various state programs adopted it in total or with slight variations as their guide for mediator conduct,<sup>2</sup> and multiple educational texts reference it in their discussion of ethical norms for mediators.<sup>3</sup>

During the past decade, however, the use of mediation has grown exponentially. State jurisdictions authorize referrals to mediation across a broad range of cases; Florida, as a single state, reported more than 100,000 cases being mediated in a given year. At the federal level, both district and circuit courts have experimented with various mediation initiatives. Delivery systems vary: some jurisdictions support the development of private marketplace mediator service delivery while others hire staff mediators in order to provide mediation services to all parties without additional cost to them. As use has grown, so have guidelines and rules; partly in response to the phenomenon that there are now more than 2200 statutory provisions or court rules shaping mediation's use, leaders in the field initiated efforts in the late 1990s that led to the development of the Uniform Mediation Act. And in contexts other than courts, such as peer mediation programs in middle schools and high schools, mediation systems in organizational contexts, and facilitated dialogue to resolve social policy conflicts, mediation's use has become prominent.

Given this expanded use, representatives from the original participating organizations believed it important to review the 1994 Version to assess whether changes were warranted. In September 2002, two designated representatives from each of the three original participating organizations convened (hereinafter referred to as Joint Committee) to initiate its review. These persons included:

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

<sup>2</sup> Such states include Alabama, Arkansas, Arizona, California, Georgia, Kansas, Louisiana, and Virginia.

<sup>3</sup> Examples include Alfini, et al, Mediation Theory and Practice, Goldberg, Sander, et al, Dispute Resolution: Negotiation, Mediation, and Other Processes.

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## II. Guiding Principles

The members of the Joint Committee adopted the following principles to govern their work:

A. The three-fold major functions of the 1994 Version – to serve as a guide for the conduct of mediators; to inform the mediating parties; and to promote public confidence in mediation as a process for resolving disputes – should remain unchanged.

B. The Standards should retain their original function of serving as fundamental, basic ethical guidelines for persons mediating in all practice contexts while simultaneously recognizing that mediation practice in selected contexts may require additional standards in order to insure process integrity.

C. The basic architecture of the 1994 Version should be retained. Where possible, the original concepts should be retained, but changes should be made to correct, clarify or respond to new developments in mediation practice.

D. Each Standard should target fundamental, ethical guidelines for mediators and exclude references to desirable behaviors or “best practices” in the statement of a Standard.

E. The process for conducting the Joint Committee’s review of the 1994 Version should be accessible by the various publics interested in and affected by the practice of mediation.

F. Any changes to the Standards should be supported by a consensus of all Joint Committee members.

### III. Joint Committee Schedule of Operations

The Joint Committee convened in September 2002 to begin its work. Members discussed basic governing principles to guide both procedural and substantive issues. It agreed to recruit a Reporter to assist it in its work.

At its meeting in March 2003 at the ABA's Section of Dispute Resolution Annual Conference in San Antonio, Texas, the Joint Committee adopted the following procedural guidelines:

- a) Convene a series of Joint Committee meetings during the 2003-04 period at which the Committee members, in executive session, would analyze the 1994 Version, consider input from outside the Joint Committee, raise questions or concerns about its current vitality, and, if appropriate, develop and adopt alternative format, language, and content;
- b) Conduct regular public sessions at the various conferences or meetings of the sponsoring organizations with the goal of eliciting comments and insights from practitioner audiences regarding appropriate questions to raise about the project's goals or particular elements of individual Standards; and
- c) Publish the Committee's work through a web site in order to elicit broad-based comments and reactions to the Joint Committee's activities.

In July 2003, the Joint Committee, through its Reporter, sent letters of invitation to more than 50 organizations in the dispute resolution field requesting them to designate a liaison to the Joint Committee. The Committee Reporter was charged with contacting these organizational liaisons in timely, regular ways to alert them to the development of the Joint Committee work. While participation and comments were desired from all persons affected by the Joint Committee's work, the Joint Committee believed that having organizations identify such liaison personnel would expedite communication.

The Joint Committee met in executive session in May 2003, October 2003, January 2004, April 2004, November 2004 and December 2004. These in-person sessions were accompanied by extensive conference call discussions. The Joint Committee conducted public forum about its work at the annual conferences of the ABA's Section of Dispute Resolution (March 2003 and April 2004) and the Association for Conflict Resolution (October 2003 and October 2004). It established its website, listing the 1994 version and inviting practitioner comment, in July 2003 ([www.moritzlaw.osu.edu/dr](http://www.moritzlaw.osu.edu/dr)).

The Joint Committee posted a proposed revised Model Standards (January 2004) in January 2004. It received public comments to the posting, both via website responses and the workshop discussion at the ABA's Section of Dispute Resolution Annual Meeting in April 2004. Throughout Summer 2004, the Joint Committee engaged in extensive conference call discussions to analyze and address the various issues raised by

public comment. It posted Model Standards (September 2004) at the beginning of September; this version reflected substantial changes to the Model Standards (January 2004) document, including a significant proposed revision for the role and shape of the Reporter's Notes. At the time of the posting, the Joint Committee invited public comments for an approximate 60-day period, noting that it planned to meet in early November to begin consideration of its final draft. Public comments were received through early December 2004 and considered at the Joint Committee's final sessions on December 6-7, 2004. Through subsequent conference calls during December 2004, the Joint Committee developed its December 2004 draft, a draft designed as a final document, subject to consultation by Joint Committee members with their respective internal constituencies. The December 2004 draft and accompanying Reporter's Notes (January 17, 2005) were posted to the website for public information purposes. During the January-March, 2005 period, the Joint Committee examined targeted suggestions from constituent sources and developed the April 10, 2005 document.

The Joint Committee has agreed unanimously to recommend to its respective organizations for appropriate adoption the Model Standards of Conduct (April 2005) (hereinafter referred to as Model Standards (April 2005)).<sup>4</sup>

#### IV. Format of Model Standards (April 2005)

*General changes.* The Joint Committee has recommended several significant organizational format changes to the 1994 Version. The Joint Committee, with the aid of sustained, thoughtful public comments, concluded that the 1994 Version could be improved by adopting the following principles: (1) separate the statement of the Standard's title from a statement of the Standard itself; (2) divide the statement of the Standard into enumerated paragraphs and sub-paragraphs, thereby facilitating clarity of exposition and public discussion of distinct, albeit related concepts; (3) eliminate the ambiguous status of the "hanging paragraphs" that follow the statement of the Standard itself by drafting the document so that all entries provide meaningful guidance for mediator conduct; (4) distinguish the level of guidance provided to the mediator by the targeted use of the verbs, "shall" and "should," thereby eliminating the need for the categorical distinction between the statement of the Standard and "Comments;" (5) shape the document so that the language of the Standards guides the mediator's conduct rather than the conduct of other mediation participants; and (6) shape the document to provide guidance for mediator conduct in situations when the operation of two or more Standards might conflict with one another.

While believing that the 1994 Version could be improved in these ways, the Joint Committee wants to state publicly its collective admiration and respect for the efforts of

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<sup>4</sup> The Joint Committee has formatted the first page of the Model Standards (April 2005) so as to reflect an effective date. The effective date will be that date on which, chronologically, the last of the three original participating organizations adopts the Model Standards. The Joint Committee has instructed its Reporter that, once an effective date is established, he should revise the Reporter's Notes to change all references to "Model Standards (April 2005)" to reflect that adoption date.

those individuals who crafted the 1994 Version. The quality of their work is confirmed in multiple ways, including the numbers of states that have adopted the 1994 Version to govern its court-annexed mediation programs and the number of textbooks that cite it in discussions of mediator ethics. As the Joint Committee considered using alternative phrases and words in various Standards and Comments, it routinely returned to admiring the insight contained in the original Standards. And perhaps most significantly, the Joint Committee, after canvassing multiple codes and standards operating in courts and programs, enthusiastically confirmed that the drafters of the 1994 Version had served the public elegantly by providing a comprehensive, useable document organized around nine Standards. The Joint Committee has retained that basic architecture throughout its revisions.

*Changes in format to the Model of Standards of Conduct for Mediators.* The Joint Committee attempted to incorporate and implement the above-noted principles throughout its multiple drafts. In the first posted revision, the Model Standards (January 2004) embraced the principles of having a title for each Standard, stating the Standard in declarative sentences targeted exclusively at guiding mediator conduct, enumerating them in appropriately separated sentences, and distinguishing the type of mediator guidance offered by a Standard or Comment by the use of “shall” and “should” respectively. Second, in terms of format, the Model Standards (January 2004) used footnotes to try to provide several types of information: a) a definition of relevant terms; (b) examples of how a particular Standard or comment might operate at cross purposes with another Standard in a particular setting; (c) general comments regarding the significance of particular Standards, using verbatim the language of the 1994 Version; and (d) clarification, by way of example, of new elements being added to the 1994 Version. Third, the Model Standards (January 2004) suggested that the Reporter’s Notes would be an official source to summarize or clarify matters relevant to the statement of the Model Standards.

Public comments to the Model Standards (January 2004) applauded the Joint Committee’s effort to organize crisply the statement of the Standard and the Comment section. However, many noted that the use of footnotes was problematic: format-wise, it instantly prompted a reader to assess what status to accord them: were they binding? Were they of the same significance as a statement of a Standard or Comment? And, in the final analysis, what would be their relationship to an expanded version of the Reporter’s Notes? Further, given that one of the Joint Committee’s guiding principles was that substantive changes to the 1994 Version would be made only if there were evidence that current practice or policies warranted such changes, some charged that the footnotes, even in combination with enriched Reporter’s Notes, did not systematically deliver on that promise. Finally, several persons suggested that the content or statement of particular footnotes needed clarification.

The Joint Committee, in its deliberations during the April-August 2004 period, found persuasive the public comments that argued that the use of footnotes created complexity and confusion rather than clarity. Accordingly, the Model Standards (September 2004), with two exceptions, contained no footnotes; those exceptions

addressed two topics that the Joint Committee thought important to reflect in the document itself: first, that no participating organization had yet to consider and adopt the Model Standards (September 2004); and second, that the use of the term, ‘mediator’, in the Standards was to be understood to apply to persons operating in a co-mediator model as well as to those working in a solo capacity. In eliminating the footnotes, however, the Joint Committee proposed having the Reporter’s Notes serve as the legislative history regarding the development and application of the Model Standards of Conduct for Mediators. Accordingly, it directed its Reporter to format and prepare the Reporter’s Notes so that the Notes contained a discussion of the following elements: the concerns and rationale the Joint Committee found persuasive for offering substantive changes to the 1994 Version; examples of application questions that the footnotes in the Model Standards (January 2004 ) were designed to address; and a recounting, at least in a general way, of the types of concerns and comments raised by public participants and the manner in which the Joint Committee addressed those comments in its current draft.

In response to public and organizational comments to the Model Standards (September 2004), the Committee made three significant changes in developing the December 2004 draft. First, in response to public concerns about there being multiple documents (i.e. the Model Standards and the Reporter Notes), the Joint Committee chose to develop a format for the Standards such that the document itself constituted a complete statement. The Joint Committee concluded that it would not try to integrate or weave the Reporter’s Notes or any other commentary into the final statement of the Model Standards nor have the Reporter’s Notes viewed as an independent but necessary component of the publication of the Standards for which formal adoption by participating organizations would be sought. Each Joint Committee member agrees, though, that these Reporter Notes accurately reflect the commentary, history and deliberations of the Revision process and hopes that they serve their intended educational role.

Second, the Joint Committee chose to eliminate organizationally the distinction between Standards and Comments, opting to address through clear language in each entry the precise guidance provided to a mediator.

Finally, the Joint Committee included explicit provisions directed to considerations of interpretative construction.

## V. Analysis of Model of Standards of Conduct for Mediators (April 2005).

### A. Preamble

The Model Standards (April 2005) amends the organizational format of the 1994 Version. It identifies an effective date for the adoption of the Standards by participating organizations, begins with a paragraph describing the historical context of the document and its revision, and substitutes a *Preamble* and *Note on Construction* for the “Introductory Note” and “Preface.”

The Joint Committee determined that the Model Standards, to be most effective, must operate as a single, self-contained, defining document. As a result, while it noted that the Reporter's Notes could serve a valuable educational function for the public regarding the rationale for various changes, the Joint Committee concluded that its prior consideration to have the Reporter's Notes serve an integral role as an interpretative resource for the Standards was misdirected. Further, the Joint Committee determined that the distinction between a statement of a "Standard" and the "Comments" relevant to that Standard was ultimately not helpful; although this distinction occurs in the 1994 Version and had been retained by the Joint Committee in both the Model Standards (January 2004) and Model Standards (September 2004), the Joint Committee decided that the fundamental difference for guiding mediator conduct contained in this categorical distinction was more effectively communicated in clear language for each entry. To promote clarity, the Model Standards (April 2005) contains a new section entitled *Note on Construction* with material that explains the level of mediator guidance provided by each entry. With these significant format changes, the Joint Committee believes the Model Standards (April 2005) can operate effectively as a self-contained document.

In the *Preamble*, the Model Standards (April 2005) revises the definition of mediation in order to make it consistent with changes in Standard I that recognize that party self-determination operates over not just voluntary decision-making as to outcomes but to multiple process components as well. Since the publication of the 1994 Version, there has been significant academic and policy discussion focused on mediation style or theory. In particular, the terms, facilitative and evaluative, to describe mediator orientations have taken on particular meanings in the popular literature and approaches to mediation differently conceptualized in such frameworks as problem-solving or transformative have been trenchantly analyzed. The revised definition of mediation is not designed to exclude any mediation style or approach consistent with Standard I's commitment to support and respect the parties' decision-making roles in the process.

#### B. *Note on Construction*

This section is designed to provide clarity to the interpretation and application of the Standards, both individually and collectively.

The Model Standards (April 2005) retain the 9-Standard architecture of the 1994 Version. The *Note* indicates that the Standards are to be read and construed in their entirety. The interpretative principle that mandates that each Standard be read and interpreted in such a manner as to promote consistency with all other Standards is the presumed operative principle guiding the drafting of the Model Standards (April 2005).

By eliminating the structural framework that led to using "shall" and "should" in the statement of the Standard and Comment respectively, the Joint Committee believed it important to define these terms, given the purposes and goals of these Standards. The definition of 'shall' prescribes mandatory mediator conduct. The definition of 'should', more sharply than conventional understanding might otherwise suggest, stipulates that the recommended guidance to a mediator, though not mandated, can be discarded only

for compelling reasons. The combined message is clear: the Standards, in their various statements, provide strong guidance for mediator conduct; while not presuming to be a “rule-book” that anticipates and answers every possibility, the Standards provide meaningful guidance for most situations and the burden transfers to an individual mediator to justify a departure from its prescriptions.

While some sections of the Model Standards (April 2005), such as Standards III (A-F) and IV (B), make reference to a time frame for a mediation (using language such as “during and after a mediation,”) the *Note on Construction* notes clearly that the Model Standards (April 2005) do not try to provide precise definitions for the beginning and ending of a mediation. The Joint Committee recognizes that such definitional precision might be important in some contexts, such as where court rules, statutes or other regulations govern a mediation; however, in other settings, the exact beginning or end of a mediation is not always clear, yet the Model Standards (April 2005) are designed to guide mediator conduct even in such contexts of ambiguity.

The *Note* explicitly addresses the fact that a mediator’s conduct may be affected by applicable law, court rules, regulations, other applicable professional rules, mediation rules to which the parties have agreed, and agreement of the parties, some of which may conflict with and take precedence over compliance with these Standards. This topic is noted here for both format and substantive reasons. Organizationally, it became clumsy to represent this conflict throughout the document with such phrases as “unless otherwise required by law;” while that phrase has been used once in the statement of a provision of Standard V dealing with Confidentiality (a significantly law-regulated area of mediator activity), the Joint Committee believed it best to state this basic proposition at the beginning of the document so that it would operate as a presumed understanding throughout.

Substantively, the Joint Committee, in response to comments, believed it important to clarify for a mediator what posture he or she should adopt when confronted with such a conflict. The basic principle, while straightforward, requires elaboration. The principle that guides mediator conduct in such contexts is: in the event of a conflict between a provision of a Standard and one or more external sources identified in the *Note*, a mediator ought to conduct oneself in a manner that retains and remains faithful to as much of the spirit and intent of the affected Standard, and all other Standards, as is possible. The following example is illustrative: Assume that a court orders a party to mediation; one party’s counsel telephones the mediator and states that neither the lawyer nor client plans to attend, believing any such session to be worthless for this case. The mediator reminds the attorney of the court directive; indeed, in some jurisdictions, since the mediator may even have a duty to report participant non-attendance to the referring court, the mediator may remind the attorney of that matter, too. Here is a conflict between a court rule and Standard I: a mediator cannot consistently adhere to the court rule and simultaneously honor the prescription in Standard I that a mediator conduct the mediation based on party self-determination with regard to “...participation in [a mediation.]” When a mediator in this situation recognizes that the court rule takes precedence over this provision of Standard I, a mediator still has an ethical responsibility

to conduct that mediation in a manner consistent with all other aspects of Standard I – e.g. respecting and promoting self-determination with respect to process design and outcomes – as well as consistent with all other Standards. The current language of the penultimate paragraph reflects the Joint Committee’s decision that a mediator must act in various practice contexts in a manner that retains and advances as much of the spirit and intent of the Standards as is possible.

The Joint Committee has consistently noted that the Standards can be used in multiple ways by individuals, programs, or organizations, including requiring compliance with these Standards as a condition for continuing membership in a program or organization. The Joint Committee, however, has added a final paragraph under *Note* to clarify for mediators that courts or other entities may use these Standards to establish the expected level of care for mediator conduct.

### C. Standard I: Self-Determination.

There are two significant changes proposed to the 1994 Version. First, the 1994 Version focuses exclusively on exercising self-determination with respect to outcome; it is silent with regard to such matters as mediator selection, designing procedural aspects of the mediation process to suit individual needs, and choosing whether to participate in or withdraw from the process. The Model Standards (April 2005) extends the scope of self-determination to these other areas.

Second, the 1994 Version does not address the question of the interplay among the Standards. In some instances, the interplay is consistent but the mediator must be cognizant of it. For example, while parties can exercise self-determination in the selection of their mediator, a mediator must consider *Standard III: Conflicts of Interests* and *Standard IV: Competence* when deciding whether to accept the invitation to serve. Alternatively, the interplay among Standards may result in a conflict; a mediator, for example, may feel pulled in conflicting directions when the mediator, duty-bound to support party self-determination (*Standard I*), recognizes that parties are trying to design a process that is not mediation but want to call it mediation to gain confidentiality protections, thereby undermining the mediator’s obligation to sustain a quality process (*Standard VI*). Standard I(A)(1) and I(B) explicitly recognize this potential for conflict and indicates to the mediator that sustaining a quality process places limits on the extent to which party autonomy, external influences, and mediator self-interest should shape participant conduct.

Standard I (B) directly addresses the concern that mediators may undermine party self-determination or themselves experience conflicts of interest as a result of pressure or incentives generated by court personnel, program administrators, provider organizations, the media, or other outside influences. Many factors can operate this way, intended or not: for instance, a program administrator might suggest to one mediator that more cases shall be assigned to another mediator because that person “always gets a settlement,” or a news media writer might report settlement talks as having stalled in a way that might

possibly harm the reputation of the identified mediator. The result is that such pressures or influences prompt the mediator to engage in conduct to override party self-determination in an effort to gain resolution. The Joint Committee reaffirms the Comment in the 1994 Version on this point that the mediator's commitment to the parties and process must remain steadfast and a mediator must not coerce parties to settle; the language of the Model Standards (April 2005) has been sharpened to eliminate any ambiguity regarding that duty.

Several public comments raised concerns that the language of the 1994 Version stating, "Self-determination is the fundamental principle of mediation" had not been retained. The Joint Committee believes that the expanded statement of Standard I, together with the definition of mediation appearing in the Preamble, appropriately reaffirms the central responsibility that a mediator has to actively support party self-determination, prohibits conflict of interest issues from undermining a mediator's commitment to promoting party self-determination (I(B)), yet recognizes, as noted above, that Standards may conflict.

Other public comments suggested that the Standard should contain language that requires the mediator to make certain that the parties made informed decisions; given the significant controversy about whether and how a mediator might insure that a party's decisions are suitably informed, the Joint Committee reaffirmed retaining the language of the 1994 Version as I (B). Additionally, several public comments noted that parties can be effectively ordered to mediation by a judge, thereby rendering self-determination as to process irrelevant. The Joint Committee addresses this dynamic in the *Preamble* in its discussion of the potential conflict between the operation of the Model Standards (April 2005) and other sources that might govern an individual mediator's conduct. Finally, some public comments suggested that Standard I should contain guidance to a mediator regarding his or her duty to report "good faith" participation by various mediation participants. To the degree that might be required by other rules governing mediator behavior in a particular setting, the Joint Committee addresses this topic in the *Note on Construction's* statement regarding potential conflicts. However, in Standard V (A) (2) on confidentiality, the Joint Committee explicitly supports the position widely adopted in practice and program rules that a mediator can override confidentiality, if required, for only two purposes: to report whether parties appeared at a scheduled mediation or to report whether the parties reached a resolution; the Joint Committee rejected overriding the confidentiality requirement for any other purpose.

#### D. Standard II: Impartiality

The Joint Committee believes that several developments of the past decade's growth in mediation practice warrant changes to the 1994 Version of Standard II. First, with the expanded growth of private sector mediation practices, the range of business practices and practices regarding fees raises concerns about the mediator being perceived as partial. Second, with the remarkable diversity of participants in mediation, challenges have arisen with regard to sustaining a mediator's impartiality while simultaneously respecting practices grounded in different cultures.

The Model Standards (April 2005) addresses these concerns in the following way. In Standard II (A), the Joint Committee reaffirms the central role of the need for a mediator to be impartial; disclosure of potential conflicts of interests, and parties choosing to proceed following such disclosure, is a separate consideration addressed in Standard III.

Second, the propriety and impact of fee arrangements, including success fees or practices involving unequal payment of the mediator's fee by the parties, affects several Standards; the Joint Committee chose to address these matters in *Standard VIII: Fees and Other Charges*.

In response to insightful public comment, the Joint Committee revised the language of what is now Standard II (B)(1) to reflect that the mediator must not act in a manner that favors or prejudices any mediation participant based on the personal characteristics, background, values and beliefs, or performance at a mediation of that individual; the proscription governs the mediator's conduct towards any participant, not just the parties. While the Standard delineates recognizable elements that operate to undermine mediator impartiality, the list is not exhaustive. Additionally, the Joint Committee decided to strengthen the 1994 Version by shaping the Standards both to guide the conduct of mediators rather than other mediation participants and to provide guidance for mediator conduct through the defined use of "shall" and "should;" by so doing, the Joint Committee agreed that the phrase, "should guard against," that is used in the 1994 Version in this section was not consistent with such changes.

Some public comments urged the Joint Committee to adopt language that required the mediator, when his or her ability to remain impartial was undermined, to withdraw from the mediation "without harming any party's interests." Individual members of the Joint Committee questioned whether withdrawal without harm to at least some interests of one or more parties is always possible, even though all agreed that the duty to withdraw in these circumstances is clear. The Joint Committee believes that the manner of withdrawal is a matter of "best practices;" further, throughout the Standards, the Joint Committee has declined to insert language that requires a mediator to insure a particular outcome.

Finally, potential challenges to a mediator's impartiality in private sector practice arise with remarkable frequency. For example, if all parties, their representatives and the mediator are immersed in discussions in an all-day mediation and they decide to order food for lunch, does the mediator violate Standard II if the lawyer for one of the parties offers to pay for everyone's lunch? If a mediator accepts a small gift from a grateful party following a successful mediation, must the mediator return it on pain of violating the impartiality requirement? And these matters become more complex when practices grounded in cultural traditions surface: if the cultural tradition of one party prompts that individual to bring a ceremonial gift to the mediator in order to reaffirm the seriousness of the talks and the well-wishes that the talks proceed constructively, can the mediator accept it? The Joint Committee supports the individual mediator, whether in a private practice setting or government or organizational program setting responding sensitively

and comfortably to such contemporary practices, but with the caveat that all such conduct be grounded in a sincere assessment as to whether accepting such benefits or giving such gifts will raise questions as to that mediator's actual or perceived impartiality; by using the term "de minimis gifts or incidental items," the Standard signals to the practicing mediator that the threshold for questioning whether a mediator is no longer impartial for these types of matters is low.

There were several public comments expressing concern that the following language from the 1994 Version's Comment Section of Standard II had not been retained in the posted Model Standards (January 2004):

"When mediators are appointed by a court or institution, the appointing agency shall make reasonable efforts to ensure that mediators serve impartially."

Comparable comments were received regarding the role of program administrators in government or organizational mediation programs. The Joint Committee appreciates the conviction expressed by program administrators operating in court or other institutional settings that the cited language serves a critically important role in assisting program administrators to advance quality mediation practice. However, one goal of the Model Standards (April 2005) is to have all language focus sharply and exclusively on guiding mediator conduct; for that reason, the Joint Committee has consistently resisted suggestions that it develop language that recognized and extended coverage of the Standards to administrators of mediation programs in court, administrative and organizational contexts. That is not to suggest, however, that the Standards will not influence the conduct of these other participants, indirectly or directly; for instance, the Joint Committee explicitly addresses the concerns raised by these comments in Standard I (B): *Self-Determination* where the language of the Standard reinforces the mediator's duty to the parties and process when responding to pressure being exerted by such outside influences as court personnel or provider organizations.

#### E. Standard III: Conflicts of Interest

Standard III (A) defines a conflict of interest as a dealing or relationship that undermines a mediator's impartiality; while Standard II and III are explicitly connected in a fundamental manner, the Joint Committee felt it important to retain the distinction in order to emphasize that a mediator's impartiality is central to the mediation process and that mediator conduct that raises questions of conflicts of interest serves to undermine public or party confidence in the central integrity of the process.

Standard III (A) notes that a conflict of interest can arise from multiple sources in multiple time dimensions. A mediator must canvass this extensive range of possible disqualifying activities, attuned to the notion that his or her immediate duty is to disclose information that might create a possible conflict of interest; if parties, with knowledge of the relationship, consent to that mediator's service, then the mediator, pursuant to

Standard I, could proceed. However, the Model Standards (April 2005) retains content and language of the 1994 Version that notes that if the conflict of interest casts serious doubts on process integrity, then the mediator shall decline to proceed despite the preferences of the parties.

Public comment requested clarification of the interplay between such sections as Standard III (C) or III (D) with Standard II (C): Impartiality. As is referenced in the Reporter's Notes in *Note on Construction*, the interpretative principle mandates that each Standard be read in a manner that promotes consistency. Applying that principle, in Standard II (C), the Joint Committee supports the posture that a mediator shall not conduct a mediation if he or she is unable to conduct it in an impartial manner; even if participants, under Standard III (C) or III (D) gave consent to the mediator to proceed after a mediator disclosed an actual or potential conflict of interest, Standard II (C) prohibits the mediator from proceeding.

Some Committee members were disturbed to hear reported that a common practice among some mediators is for the mediator not to disclose with all mediation parties and their representatives that the mediator has served previously as a mediator in situations involving some of the mediation parties or their representatives; the language of III (A) seriously questions the integrity of such a practice.

Standard III (B) explicitly acknowledges that how one conducts a conflicts check varies by practice context. For a complex case that comes to a mediator through his or her law firm, best practice consists of making a firm-wide conflicts check at the pre-mediation phase. By contrast, for a mediator of an interpersonal dispute administered by a community mediation agency who is charged with mediating the case immediately upon referral, making an inquiry of the parties and participants at the time of the mediation regarding potential conflicts of interest may be sufficient.

In drafting Standard III (C), public comments highlighted one particular source of potential conflict as being that situation in which a significant portion of a mediator's work, particularly when compensated, comes from a single source; these commentators suggested that that situation be explicitly addressed. The Joint Committee, as individuals, agreed that such a situation creates a serious potential conflict and that there would be a duty minimally to disclose that situation. However, as other public comments noted, there are multiple examples of relationships between one party and a mediator that give rise to the same concern about conflicts of interest; if one attempted to catalogue a comprehensive list, then failure (through oversight) to include some relationship might be seen, incorrectly, to license that conduct. Therefore, the Joint Committee developed language of a general nature.

In performing the mediator's role, an individual displays multiple analytical and interpersonal skills; therefore, it is not surprising that a mediation participant who witnesses such talent might consider employing that mediator again. If a mediation participant, be it a party, party representative, witness or some other participant wants to employ the individual mediator in a subsequent mediation, or in another role (such as a

personal lawyer, therapist, or a consultant to their business), then the individual serving as mediator must make certain that entering into such a new relationship does not cast doubt about the integrity of the mediation process. The Model Standards (January 2004) contained an explicit enumeration (Paragraph C) that prohibited a mediator from soliciting any type of future professional services; in response to public comments critical of the broad, absolutist language of that paragraph, the Joint Committee deleted that provision in the Model Standards (September 2004) and revised the language of what was then Comment 3 to address this matter. The final language appears in Model Standards (April 2005) as Standard III (F). Unlike some other Codes, Standard III (F) does not impose rigid time lines to regulate the development of such relationships but does suggest that the amount of time that has elapsed is a factor to consider.

#### F. Standard IV: Competence

Mediators operate in many contexts and reflect a broad range of backgrounds, trainings, and competencies. The Model Standards (April 2005) retains the commitment expressed in the 1994 Version that the Standards not create artificial or arbitrary barriers to serve the public as a mediator. But to promote public confidence in the integrity and usefulness of the process and to protect the members of the public, an individual representing himself or herself as a mediator must be committed to serving only in those situations for which he or she possesses the basic competency to assist.

The Joint Committee, Standard IV (A), changes the language of the 1994 Version to use the term, ‘competence’ in place of ‘qualification.’ In elaborating on IV (A), Standard IV (A) (1) indicates that such elements as training, experience in mediation, and cultural understandings are often necessary in order to provide effective service. But the Joint Committee understands its language to explicitly reject two notions with regard to the operations of this Standard: first, that possessing particular educational degrees is an absolute requirement to establish mediator competency, and second, that the list of desirable competencies means that each competency is required for effective service in every mediation.

Standard IV (B) recognizes the situation in which a mediator, upon agreeing to serve, learns during the course of the discussions that the matters are more complex than originally anticipated and beyond his or her competency. In such a situation, Standard IV (B) imposes a duty on that mediator to take affirmative steps with the parties to address the situation and make appropriate arrangements for serving them (perhaps through hiring co-mediators with relevant competencies or the selection of an alternative mediator).

Public comments on the Model Standards (January 2004) strongly supported language that reaffirmed, as a central feature of Standard IV, that training and experience are the necessary and sufficient conditions for service as a mediator. The Joint Committee believes that its current language reflects that commitment and that it appropriately appears in Standard IV (A) (1). The Joint Committee also wanted to emphasize that

mediator competency also includes cultural understandings, a dimension that the 1994 Version does not address. Additional public comments suggested that the language of the Standards include reference to an individual's meeting the qualification requirements set forth by relevant state statutes; the Joint Committee believed that its statements in the *Note on Construction* regarding the relationship between the Standards and state law addressed this matter, together with its *Preamble* statement that the Standards are considered as fundamental ethical guidelines; particular programs or practice areas might require additional elements for service.

Standard IV (C) mandates that a mediator not conduct the mediation if she or he is impaired by drugs, alcohol, medication or otherwise. If a mediator has the ability to correct this impairment, then she or he can initiate or continue service.

#### G. Standard V: Confidentiality

One of the most significant developments surrounding the practice of mediation that has occurred since the adoption of the 1994 Version has been the development of the Uniform Mediation Act (2003). That undertaking significantly enhanced professional conversation and awareness of the policy goals advanced by the presumption that parties should determine their own rules regarding confidentiality and that communications made for purposes of advancing a mediation conversation should not be available for use in subsequent proceedings. Discussion and debate surrounding that uniform law focused significantly on whether the parties and the mediator or just the parties should hold the privilege independently, and what exceptions to the privilege should be made a part of law. While this Standard is consistent with the confidentiality policy goals of the Uniform Mediation Act, it is not designed to match its substantive provisions and nuances in every dimension.

Standard V directs mediator conduct in two ways. First, it imposes a duty on the mediator not to share with others information obtained as a result of serving as a mediator. Even if the parties agree that the mediator shall disclose it (pursuant to Standard I (A)), Standard V (A) (1) states that the mediator may do so but is not required to do so. Second, Standard V imposes a duty on the mediator to promote participant understanding of the extent to which information shared and comments made for purposes of mediation are confidential. What is crucial to the effective operation of the Standard – and hence to the integrity of the process – is that all participants to the mediation, including the mediator, actively seek to understand the nature and extent of the confidential status of communications made during the mediation. The current language promotes that goal.

Some public comments to prior versions urged the Joint Committee to adopt language that explicitly linked or tracked the Standard to the requirements of state or Federal law; as noted above in a related matter, the Joint Committee placed references in the *Note on Construction* to the interplay between the Standards and relevant legal guidelines, in part to enhance the fluidity of the language of the Standards and in some measure to resist a

perceived tendency to over regulate mediation practice. The Model Standards (April 2005) retains, in both V (A) and V (A) (2), references to recognized exceptions to the confidentiality reach.

Standard V(A)(3) tracks the concept of the 1994 Version in which its drafters sought to insure that the Confidentiality Standard did not prohibit monitoring, research, evaluation or education of mediation by responsible persons. However, since the language of the Standards is targeted to guide mediator conduct, the language of the 1994 Version required modification. Further, when reflecting on the nature of how the teaching, research and evaluation of mediation could appropriately go forward, the Joint Committee thought it appropriate to adopt a two-fold goal: first, protect the identity of individual participants, so that a mediator participating in teaching, research and evaluation could discuss aspects of the case but doing so in a way that does not readily enable people to discern the identities of the parties; second, to permit teaching, research and evaluation to proceed without imposing undue requirements for gaining party consent to every initiative – for example, if a court system sought to evaluate its mediation program, it would be an undue requirement to insist that the evaluator affirmatively obtain from every party or party representative to a mediation his or her consent to have reported such elements as the length of a mediation session.

Some public comments suggested that a mediator, when conducting a caucus, can appropriately place the responsibility on the party with whom she or he is caucusing to flag each element of information that the party wishes the mediator to keep confidential. In Standard V (B), the Joint Committee rejects that approach to the degree that it is not consistent with securing meaningful and timely party consent. At a practice level, the Joint Committee notes that some mediators advise the participants that the mediator will keep confidential those matters disclosed by a participant if the participant so requests; otherwise, the mediator shall treat comments made in the caucus as being ones that he or she could use in subsequent caucuses if doing so, in the mediator's judgment, would help advance discussion. By contrast, the practice of other mediators when conducting a caucus is to advise the participants that a mediator will treat all matters shared with him or her as confidential but shall ask at the end of a particular caucus whether the mediator has the participant's consent to use any or all of that developed information in subsequent caucuses. Whichever practice is adopted by a mediator, Standard V (B) affirms that it is a mediator's duty to insure that party consent to the approach is known, meaningful and timely.

Standard V (C) targets a mediator's responsibility to make certain that the parties understand the extent to which they, not the mediator, will maintain confidentiality of information that surface in mediation. Section V (D) is a provision that applies equally to V (A-C); while some might believe it implicit in each of the preceding paragraphs of the Standards, the Joint Committee thought it important to emphasize, even if somewhat redundant, the need for participant understanding of the confidentiality guidelines governing the conversation.

## H. Standard VI: Quality of the Process

The 1994 Version sets forth in the statement of the Standard and in its “hanging paragraph” a series of distinct, concrete ways in which a mediator could act to advance a quality process. The Model Standards (April 2005) captures those elements in its statement of VI(A), incorporating from public comment a revision that requires a mediator to conduct a process that advances procedural fairness, not, as in the Model Standards (January 2004), “process fairness.”

Public comments to both the Model Standards (January 2004) and the Model Standards (September 2004), combined with further Joint Committee discussion, resulted in several changes reflected in the Model Standards (April 2005). In summary form, those changes include:

1. Comment 1 from the Model Standards (January 2004) read as follows: “A mediator should conduct mediation in a way that prevents one or more parties from manipulating the process to advance personal goals that are inconsistent with mediation principles and values.” That comment has been deleted for two reasons: first, the Model Standards (April 2005) focus on guiding mediator behavior and not that of other participants in the mediation process; second, the Model Standards (April 2005) capture the goal of preventing such participant behavior in provisions such as VI (A) (6).
2. Standard VI (A) (1-9) is sequenced to reflect the presumptive order in which a mediator might confront these considerations in practice.
3. Standard VI (A) (4) reflects the nuanced environment in which mediation occurs. The language of Standard VI(A)(4) prohibits a mediator from knowingly misrepresenting a material fact or circumstance to a mediation participant while it acknowledges that resolving matters in mediation is not always predicated on there having been complete honesty and candor among those present. To state the matter differently, while mediation participants might engage in negotiating tactics such as bluffing or exaggerating that are designed to deceive other parties as to their acceptable positions, a mediator must not knowingly misrepresent a material fact or circumstance in order to advance settlement discussions.
4. Standard VI (A) (5-8) reflects an effort to reorganize and distinguish more sharply among related but importantly different directions to the mediator. VI (A)(5) announces that the mediator’s role differs substantially from that of other professional roles; the goal is to distinguish between a mediator’s role and such other roles as being a lawyer, mental health counselor, and the like. Yet, (A)(5) also recognizes that the insights and training the mediator draws upon to assist parties in mediation might simultaneously constitute an important element of enabling a mediator to be competent and effective to serve the parties in that setting and be drawn from the mediator’s training and experience in those other professional roles. So, the language of VI (A) (5) recognizes the differing roles

that a mediator as an individual assumes in his or her life and then supports the mediator sharing information that he or she is qualified by training or experience to provide only if it is done in a manner consistent with other Standards, most notably promoting party self-determination and sustaining mediator impartiality.

Standard VI (A) (6) makes it explicit that a mediator cannot engage in a ruse of labeling a dispute resolution process as “mediation” in order to gain its benefits (such as confidentiality protections) when it is apparent that the participants have designed and participated in some other form of dispute resolution. (A)(7), as a stand-alone entry, notes that it certainly is plausible for a mediator to recommend, when appropriate, that the parties consider resolving their dispute through some other third-party process. This guideline makes at least two presumptions: first, that a mediator might identify such an option when it seems an appropriate track to pursue as a matter of process choice (i.e. “fitting the forum to the fuss”) or after mediation efforts to resolve the issue(s) have not been successful in resolving all issues to each party’s satisfaction; and second, that the mediator is qualified by training or experience to explain to the parties, if requested, how these various processes operate. Finally, (A) (8) clarifies that a mediator shall not undertake in the same matter that he or she is mediating a different intervener role (such as those described in (A)(7)) without party consent, without explaining to the parties and their representatives the implications of changing processes (e.g. a third-party decision-maker might have to make decisions regarding participant credibility that was not necessary in a mediation process), and without being cognizant that undertaking a new role might be governed by standards governing other third-party professions, such as a Code of Ethics for Arbitrators.

5. Standard VI (A)(9) reflects revised language to the 1994 Version by targeting guidance to the mediator more sharply: it guides a mediator who confronts mediation participants using mediation to further criminal conduct, not simply illegal conduct, to take appropriate steps to deter them from accomplishing that goal. Several public comments suggested that the mediator’s duty in such a situation was to affirmatively report such conduct to appropriate legal authorities. The Joint Committee rejected that suggestion for two reasons. First, the subtlety of such matters – including there being multi-issue cases in which only one issue raised a specter of criminal conduct – requires that a mediator be firm but flexible in addressing such a situation; second, confidentiality laws or agreements may prevent it, such that unless there were an exception in the confidentiality agreement for this situation or a mediator had a duty to report such conduct, a mediator might expose himself or herself to liability by reporting such conduct.

6. Standard VI (A) (10) reflects new language that addresses the situation involving a mediator’s obligation when conducting a mediation with persons with recognized disabilities. The Joint Committee recognizes that the language of Comment 8 in its Model Standards (January 2004), while included by oversight but actually reflecting the language contained in the 1994 Version, was completely unacceptable. Public comments thoughtfully suggested a variety of

possible clauses to address this situation; Comment 8 in the Model Standards (September 2004) reflected the Joint Committee’s judgment as to the best expression of the multiple commitments involved in such a situation and it received positive endorsement from several public stakeholders. That September language remains unchanged and appears as (A) (10).

7. The Joint Committee believes that developments in practice regarding the mediation of cases in which allegations of domestic abuse arise must be addressed in any revision to the 1994 Version. Public comments strongly endorsed amending the 1994 Version to address this topic and Standard VI (B) reflects that effort. The Joint Committee understands the term, “domestic abuse,” to apply to acts of both physical violence and psychological coercion among persons in a domestic relationship. Standard VI (B) also provides guidance to mediators for situations in which mediation participants in non-domestic relationships have engaged in acts of violence towards one another. Mediator guidance for addressing challenges posed by the threat of violent conduct among participants is reinforced through such other provisions as Standards I and VI (A).

Some public comments suggested that any provision targeted at mediations involving domestic abuse should contain a detailed prescription regarding the manner in which the mediator should screen participants, the requisite training to serve as a mediator in such situations, the requirement to report such matters to appropriate agencies if one is a mandatory reporter, and the like; the Joint Committee chose to retain the targeted, albeit general language of VI (B), with the notion that Standards for particular programs might choose to build in more elaborate requirements.

#### I. Standard VII: Advertising and Solicitation

With increased private sector activity in the provision of mediation services, the Joint Committee believed that the 1994 Version required modest amendment to provide guidance to mediators in a more complex, technological world. The language of Standard VII (A) addresses the complexity that confronts a mediator who seeks to communicate effectively the nature of his or her services as a mediator and his or her expertise without making representations that are inconsistent with such principles as party self-determination and mediator impartiality. Standard VII (A) (1) reaffirms the 1994 Version’s commitment that a mediator must not include any promise as to outcome.

Standard VII (A) (2) addresses the concern that a mediator representing to the public that he or she is a “certified” mediator might be misunderstood by the public as suggesting that the mediator has met a more stringent level of selectivity than is otherwise the case. The 1994 Version addresses this challenge as well. Some governmental entities, including courts or administrative agencies, and private sector organizations have developed, publicized procedures through which an individual mediator can obtain status as having been “certified” to be on that entity’s mediator roster. If a person has been

granted that status by a governmental entity or private organization, then he or she is free to so advertise it. The Joint Committee notes, however, that it would mislead the public – and be prohibited by VII (A)(2) – were an individual to complete a privately-offered mediator training program, receive a “Certificate” that states that he or she has successfully completed that course, and then advertise that she or she is a “Certified” mediator.

Standard VII (B) addresses the increasing challenge of blending appropriate communication and marketing of a mediator’s services without soliciting business in a manner that results in compromising that individual’s actual or perceived impartiality, and VII(C) prohibits a mediator from listing the names of clients or persons served in mediation without their permission.

#### J. Standard VIII: Fees and Other Charges

The Model Standards (April 2005) amends the title of this Standard from the 1994 Version by adding the words, “and other Charges.”

Several developments have prompted amendments to the 1994 Version. First, flat prohibitions on certain fee arrangements between a mediator and parties might potentially raise anti-trust concerns, and under some circumstances could subject organizations adopting the Model Standards to scrutiny by regulatory organizations. Consequently, the provisions from the 1994 Version which prohibited a mediator from charging a fee contingent upon the results of the mediation or the amount of settlement were eliminated and replaced with more general language. The language of VIII (A) and VIII (A) (1) provide guidance to a mediator regarding basic principles on which to construct a fee; the language of VIII (B), while not prohibiting the amount a person might charge for his or her mediation services, does mandate that the method or structure for fee payments cannot operate at cross purposes with such fundamental values of the mediation process as party self-determination or mediator impartiality.

A significant, controversial practice that has developed in private sector mediation practice during the past decade is the situation in which the mediator’s fee is paid in unequal amounts by the parties. The presumptive norm had been that parties pay the mediator’s fees in equal amounts, thereby insuring that the mediator’s impartiality, both in perception and reality, was secured. The reality of contemporary practice in some sectors is that one party pays the entire fee and that all parties are comfortable with that arrangement. This practice occurs routinely in such areas as the mediation of employment discrimination lawsuits, where the defendant employer pays the mediator’s fee, personal injury litigation, and the like. Some argue that parties would not have access to the benefits of mediation if such fee payment arrangements were not available.

The Joint Committee believed that, at the practical level, this practice of parties’ paying unequal amounts of the mediator’s fee creates the danger of undermining process integrity in two important ways: first, if the parties were not aware of this arrangement,

one party, upon learning of it at a later date, might believe the outcomes had been skewed in favor of the party who had paid the higher percentage of the mediator's fee; second, if the payer of the higher fee percentage is that mediator's primary or exclusive client, the practice might create the impression that the mediator's financial interest in servicing that client outweighed his or her commitment to conducting a quality process in an impartial manner. For both situations, the Joint Committee believed that the appropriate stance of the Standard should, in the first instance, support disclosure of the arrangement to all participants, since unequal payments of fees almost always creates a perception of partiality; further, the Standard should require the mediator to be attentive to how that practice, even when acceptable to all parties, impacts the integrity of the process. Standard VIII (B) addresses these concerns.

The Model Standards (April 2005) eliminates the proposed language of the Model Standards (January 2004) regarding excepting administrative fees from the concept of referral fees; public comment raised important questions about the meaning of "administrative expense" and the Joint Committee refocused its comments to address the mediator, not provider agencies or other program sponsors.

K. Standard IX: Advancement of Mediation Practice

The Model Standards (April 2005) changes the title of this Standard from the 1994 Version, replacing "Obligations to the Process" with "Advancement of Mediation Practice." The Joint Committee believes the proposed title more accurately reflects the Standard's intended focus.

Standard IX (A) (1-5) delineates some of the ways in which an individual can participate in advancing mediation practice. Given the targeted definitions provided to the terms "shall" and "should" in the Model Standards (April 2005), and consistent with public suggestions, the Joint Committee uses the term, "should," in the statement of Standard IX. The Joint Committee does not believe the delineated list of activities for advancing the practice of mediation is exhaustive nor that a mediator need engage in all of these initiatives all the time; the second sentence of Standard IX (A) reflects that judgment. Finally, the Joint Committee embraced as persuasive the thoughtful public comments that recommended that the language of Standard IX (B) substitute the word "respect" for "tolerate."

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