

JOINT COMMITTEE DRAFT

**MODEL STANDARDS
OF CONDUCT
FOR MEDIATORS**

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For Discussion Only

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PREFACE

The initiative for the original Model Standards of Conduct for Mediators came from three professional groups: the American Arbitration Association, the American Bar Association (Section of Dispute Resolution)¹, and the Association for Conflict Resolution. These same organizations came together again to revisit the Standards and invite reflection on them from throughout the mediation field.

The purpose of the original initiative in the 1992-94 periods was to establish a set of standards to serve as a general framework for the practice of mediation. The original Model Standards of Conduct for Mediators (hereinafter referred to as 1994 Version) were intended to perform three major 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 Model Standards of Conduct for Mediators, Revised (September, 2004) (hereinafter referred to as Model Standards of Conduct for Mediators) sustain those functions. They retain the nine elements of the 1994 Version in their original sequence; they retain the original language unless corrections or clarifications were required or, more significantly, new developments in mediation practice or public policies warranted adjustment. While it is recognized that, in some cases, laws or contractual agreement may affect their application, the Standards are intended to apply to all types of mediation.

The Model Standards of Conduct for Mediators reflect the following organizational format. Each Standard is identified by title. The statement of the Standard and the Comments are enumerated in separately identified paragraphs. The enumerated statements prescribe the mediator's responsibility by use of the word, "shall." For entries set forth in the Comment section, the Model Standards of Conduct for Mediators adopt the convention of providing guidance to the mediator by using the word, "should." Individual alphabetic or numerical enumerations are used to facilitate indexing; the format is not designed to reflect the relative priority of the respective statements. The Reporter Notes identify the rationale for the various changes to the 1994 Version, thereby serving as further guidance for the interpretation and application of the Standards.

Both the 1994 Version and the Model Standards of Conduct for Mediators are offered in the hope that they will serve an educational function and provide assistance to individuals, organizations and institutions involved in mediation.

For purposes of these Model Standards of Conduct for Mediators, mediation is defined as a process in which an impartial third-party – a mediator² – facilitates the resolution of a dispute by promoting voluntary agreement (or "self-determination") by the parties to the dispute. A mediator facilitates communications, promotes

¹ The views set forth in the Model Standards of Conduct for Mediators, Revised (August, 2004) have not been considered by the American Arbitration Association, the American Bar Association's Section of Dispute Resolution or the Association for Conflict Resolution and do not constitute the policy of any of these organizations.

² The term, mediator, is understood to be inclusive so that it applies to co-mediator models.

understanding, focuses the parties on their interests and seeks creative problem solving to enable the parties to reach their own agreement. These Standards give further meaning to this definition of mediation.

STANDARD I. SELF-DETERMINATION

A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome.

COMMENTS

1. Parties can exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes.
2. 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.
3. A mediator needs to be cautious of conflict of interest issues and avoid influencing party decisions toward particular outcomes for reasons such as a higher settlement rates, egos, increased fees and outside pressures from individuals or organizations.
4. A mediator cannot personally ensure that each party has made a fully informed choice to reach a particular decision, but, where appropriate, a mediator should make the parties aware of the importance of consulting other professionals to help them make informed choices.

STANDARD II. IMPARTIALITY

- A. A mediator shall conduct a mediation in an impartial manner and shall avoid conduct that gives the appearance of partiality. Impartiality means freedom from favoritism, bias or prejudice.
- B. A mediator shall mediate only those matters in which the mediator can remain impartial.
- C. If at any time a mediator is unable to conduct the process in an impartial manner, the mediator shall withdraw.

- D. A mediator shall neither give nor accept a gift, favor, loan or other item of value that would raise a question as to the mediator's actual or perceived impartiality.

COMMENTS

- 1. A mediator should guard against partiality or prejudice based on a party's personal characteristics, background or performance at the mediation.
- 2. 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.

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. A conflict of interest is a dealing or relationship that might reasonably be seen as raising a question of the 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. As soon as practicable, a mediator shall disclose 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. If a mediator learns any fact described above after accepting a mediation, the mediator shall disclose it as quickly as is appropriate. If all parties agree to retain the mediator after disclosure, the mediator may proceed or continue with the mediation. However, if a conflict of interest casts serious doubts on the integrity of the process, the mediator shall withdraw or decline to proceed regardless of the express agreement of the parties.
- C. Subsequent to mediation, a mediator shall not establish another relationship with one of the parties in any matter that would raise questions about the integrity of the mediation process.

COMMENTS

- 1. A mediator's actions necessary to accomplish a reasonable inquiry into potential conflicts of interest may vary based on service context.
- 2. Disclosure of relationships or circumstances which would create the potential for a conflict of interest rests on the mediator and should be made at the

earliest possible opportunity and under circumstances which will allow the parties to freely exercise their right of self-determination as to both the selection of the mediator and participation in the mediation process.

3. When a mediator develops a personal or professional relationship with parties, individuals or organizations following a mediation in which they were involved, the mediator should consider factors such as time elapsed following the mediation and the nature of the relationship established and services offered when determining whether the relationship might create a perceived or actual conflict of interest.
4. Potential conflicts of interest may arise between mediators and such outside influences as court personnel, program administrators, provider organizations and the media that generate pressure on the mediator to settle a particular case or cases. The mediator's commitment should be to the parties and the process. Pressure from outside the mediation process should never influence the mediators to coerce parties to settle.

STANDARD IV. COMPETENCE

- A. A mediator shall mediate only when the mediator has the necessary competence to satisfy the reasonable expectations of the parties.
- B. If a mediator, despite party expectations, determines during the course of mediation service that the mediator cannot satisfy this competency requirement, the mediator shall disclose that judgment to the parties as soon as is practicable and take appropriate steps to address the situation.
- C. A mediator shall not conduct any aspect of a mediation while impaired by drugs, alcohol, medication or otherwise.

COMMENTS

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 effective mediation. A person who offers to serve as a mediator gives parties and the public the expectation that the person is competent to mediate effectively.
2. A mediator should have available for the parties information relevant to the mediator's training, education, experience and approach to conducting the mediation process.

3. A mediator should have available for the parties information relevant to the mediator's training, education, experience and approach to conducting the mediation process
4. A mediator should attend educational programs and related activities to enhance and strengthen the mediator's personal knowledge of the skills related to mediation.

STANDARD V. CONFIDENTIALITY

- A. A mediator shall maintain the confidentiality of all information obtained by the mediator from the parties, non-party participants or documents submitted to the mediator, unless otherwise agreed to by the parties.
- B. If the parties to a mediation agree that the mediator shall disclose information obtained during the mediation, the mediator may disclose it.
- C. A mediator shall promote understanding of the confidential status among the parties of those communications made during the mediation.

COMMENTS

1. 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. Depending on the circumstance of the mediation, the parties may have varying expectations regarding confidentiality that should be addressed by the mediator.
2. A mediator who meets with a party in private session during a mediation should not convey directly or indirectly to any other party, any information that was obtained during that private session without the consent of the disclosing party.
3. In order to protect the integrity of a mediation, a mediator should not communicate information about how the parties acted in the mediation process. A mediator may report, if required, whether parties appeared at a scheduled mediation and whether or not the parties reached a resolution.
4. Nothing in this Standard should be construed to prohibit monitoring, research and evaluation of mediation activities or the continuing education of mediators.

STANDARD VI. QUALITY OF THE PROCESS

- A. A mediator shall sustain a quality mediation process in accordance with these Standards and shall conduct the mediation 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.
- B. If a mediator believes that participant conduct, including that of the mediator, jeopardizes sustaining a quality mediation, a mediator shall take appropriate steps to uphold a quality process including, if necessary, withdrawing from or terminating the mediation.

COMMENTS

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 the process. A mediator should make certain that a mediation proceeds without undue delay.
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 the entire mediation process.
4. A mediator should promote honesty and candor between and among all participants.
5. The primary purpose of a mediator is to facilitate the parties' decision-making. This role differs substantially from other professional client relationships. Mixing the role of a mediator and the role of a professional advising a client is problematic and mediators should strive to distinguish between the roles. A mediator should therefore refrain from providing professional advice. Where appropriate, a mediator should recommend that parties consider resolving their dispute through arbitration, counseling, neutral evaluation or other process.
6. A mediator should not conduct a dispute resolution procedure other than mediation but stipulate it as mediation in an effort to gain the protection of rules, statutes or other governing authorities pertaining to mediation.
7. A mediator who undertakes, at the request of the parties, an additional dispute resolution role in the same matter assumes increased responsibilities and obligations that may be governed by the standards of other professions.

8. If a party appears to have difficulty comprehending the process, issues or settlement options, or difficulty participating in the mediation process, the mediator should explore the circumstances and potential accommodations, modifications or adjustments that would make possible the party's capacity to comprehend, participate and exercise self-determination; if no such option can be reasonably provided, the mediator should take other appropriate steps, including postponing a session, withdrawing from the mediation or terminating the mediation.
9. If a mediator is made aware of domestic violence among the parties, the mediator should take appropriate steps to insure a quality process including, if necessary, postponing a session, withdrawing from the mediation or terminating the mediation.
10. If a mediation is being used to further illegal conduct, a mediator should take appropriate steps to insure a quality process including, if necessary, postponing a session, withdrawing from the mediation or terminating the mediation.

STANDARD VII. ADVERTISING AND SOLICITATION

A mediator shall be truthful and not misleading when advertising, soliciting or otherwise communicating the mediator's qualifications, experience and services.

COMMENTS

1. Communications, including business cards, stationary, or computer-based communications should not include any promises as to outcome.
2. Communications may include references to a mediator's meeting state, national or private organization qualifications only if the entity referred to has a procedure for qualifying mediators and the mediator has been duly granted the requisite status.
3. A mediator should not solicit in a manner that could give an appearance of partiality for or against a party or otherwise undermine the integrity of the process.
4. A mediator should not communicate to others, in promotional materials or through other forms of communication, the names of clients or persons served without their permission.

STANDARD VIII. FEES AND OTHER CHARGES

A mediator shall provide the parties or their representative with true and complete information about mediation fees, expenses and any other actual or potential charges that may be incurred in connection with the mediation.

COMMENTS

1. A mediator who charges fees should establish the monetary relationship between the mediator and the participants in a way that does not raise questions as to the mediator's actual or perceived impartiality.
2. While a mediator may accept payments in unequal amounts from the respective parties when they pay the mediator's fee, a mediator should be attentive to the impact, perceived or real, such a practice may have on the mediator's impartiality or the integrity of the process.
3. 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.
4. A mediator's fee arrangement should be in writing unless the parties request otherwise.

STANDARD IX. MEDIATION PRACTICE

A mediator shall act in a manner that enhances the quality of the practice of mediation.

COMMENTS

A mediator, among other activities, should:

1. Foster diversity in the mediation field, reaching out to individuals with differing backgrounds and perspectives.
2. Strive 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. Participate in research in the field when given the opportunity, including obtaining participant feedback when appropriate.
4. Participate in outreach and education efforts to assist the public in developing an improved understanding, of and appreciation for, mediation.

5. Assist newer mediators through training, mentoring and networking.
6. Exhibit tolerance of differing points of view within the field, seeking to learn from one another and work together to improve the profession and better serve people in conflict.

REPORTER'S NOTES

September, 2004

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 (then known as the Society of Professionals in Dispute Resolution) 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 more than a dozen states have adopted it to guide mediator conduct in their various state programs and multiple educational texts reference it in their discussion of ethical norms for mediators.

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 market-place mediator service delivery while others provide staff mediators to provide access to mediation for parties without additional cost. 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 1990's 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 mediation's use 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 professional organizations convened (hereinafter referred to as Joint Committee) to initiate its review.

II. Guiding Principles

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

1. 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.

2. 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.
3. The format, language, and content of the 1994 Version should be retained unless the original language required correction, clarification or reorganization or new developments in the practice of mediation or policies governing its use warranted content adjustment.
4. The Standards are not intended to be disciplinary rules.
5. 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.

III. Joint Committee Schedule of Operations

At its meeting in March 2003 at the ABA's Section of Dispute Resolution Annual Conference in San Antonio, Texas, the Joint Committee established the following procedures to guide its work:

- 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, raise questions or concerns about their 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 based platform 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 has met in executive session in May 2003, October 2003, January 2004, and April 2004. It has 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 scheduled for October 2004). It posted its website, listing the 1994 version and inviting practitioner comment, in July 2003 (www.moritzlaw.osu.edu/dr).

The Joint Committee posted a proposed revised Model Standards of Conduct (January 2004) in January 2004. It received public comments to the posting, both via website postings and the workshop discussion at the ABA's Section of Dispute Resolution Annual Meeting in April 2004. The Joint Committee has engaged in extensive conference call discussion to analyze and address the various issues raised by public comment. The Model Standards (September 2004) reflect substantial changes to the January 2004 version, including the proposed role and shape of the Reporter's Notes.

The Joint Committee plans to reconvene in November 2004 to analyze public comments and prepare any suggestions or alterations for republication in early Spring 2005 and submission of the document for review and action by their respective organizations.

IV. Format of Model Standards of Conduct for Mediators, Revised (September, 2004) (hereinafter referred to as Standards).

General changes. As the Preface indicates, the Standards reflect several changes in organizational format to the 1994 Version. The Joint Committee believed 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, thereby facilitating clarity of exposition and public discussion of distinct, albeit related concepts; (3) reduce the ambiguous status of the "hanging paragraphs" that follow the statement of the Standard itself but precede the "Comment" section by drafting the document so that entries are either a statement of the Standard or a "Comment" that elaborates on some element of the Standard; (4) distinguish the nature of the guidance provided by a Standard from that of a Comment by using the word, "shall," in the statement of the Standard and "should" in a Comment; (5) shape the document so that the language of the Standards guide the mediator's conduct rather than conduct of other mediation participants; and (6) shape the document to provide guidance for mediator conduct in illustrative practitioner 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 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 the 1994 Standards in discussions of mediator ethics. As the Joint Committee considered using alternative phrases and words in various Standards and Comments, it continually

returned to admiring and retaining the insight contained in the original language. 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 architecture throughout its revisions.

Changes in format to the Model of Standards of Conduct for Mediators, Revised (January, 2004) (hereinafter referred to as January 2004 Revised Version). The Joint Committee attempted to incorporate and implement the principles noted through several strategies in its publication of the January, 2004 Revised Version. First, the January 2004 Revised Version embraces 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, it uses 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, it attempts to suggest that the Reporter's Notes would be an official source to summarize or clarify matters relevant to the statement of the January 2004 Revised Version.

Several public comments constructively 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 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 an 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 September 2004 Revised Version, with two exceptions, contains no footnotes; those exceptions address two topics that the Joint Committee thought important to reflect in the document itself: first, that no participating organization has yet to consider and adopt the Model Standards, Revised September 2004; and second, that the use of the term, 'mediator', in the Standards is understood to apply to persons operating in a solo capacity as well as to those working in co-mediator models. In eliminating the footnotes, however, the Joint Committee became

committed to 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 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 January 2004 Revised Version 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.

V. Analysis of Model of Standards of Conduct for Mediators, Revised (September 2004).

A. Preface

The September 2004 Revision recognizes that the application of a Standard in a particular situation may be affected by governing law. For purposes of clarity of exposition, this disclaimer is placed at the beginning of the document.

The September 2004 Revision retains the basic definition of mediation used in the 1994 Version. It is not designed to exclude any mediation style consistent with Standard I's commitment to support and respect the parties' decision-making roles in the process.

B. 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 September 2004 Revised Version extends the scope of self-determination to these other areas in the statement of the standard and elaborates on its extension in Comment 1.

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). Comments 2 & 3 explicitly recognize this potential for conflict and indicate 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.

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 retention in the Preface regarding the definition of mediation, appropriately reaffirm the central responsibility that a mediator has to actively support party self-determination while recognizing, 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, as Comment 3, the language of the 1994 Version.

C. Standard II: Impartiality

The Joint Committee believes that several developments of the past decade's growth in mediation practice warrants changes to 1994 Version. First, with the expanded growth of private sector mediation practices, the range of practices regarding fees and other business practices raises concerns about the mediator being perceived as impartial. 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 September 2004 Revision addresses these concerns in the following way. First, the propriety and impact of fee arrangements involving unequal payment of the mediator's fee by the parties affects several Standards; the Joint Committee chose to address this concern with explicit language in Standard VIII: Fees & Other Charges.

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 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 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 Standards signal to the practicing mediator that the threshold for questioning whether a mediator is no longer impartial 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 January 2004 Revised Version: "When mediators are appointed by a court or institution, the appointing agency shall make reasonable efforts to ensure that mediators serve impartially." 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. One goal of the proposed revision, including the September 2004 Revision, is to have all language focus sharply and exclusively on guiding mediator conduct, not that of court administrators or other service providers. That is not to say that the Standards will not influence the conduct of these other participants but rather to affirm the appropriate focus for the Standards. With that principle, however, the Joint Committee explicitly addresses the concerns raised by these comments. Comment 4 in Standard III: Conflicts of Interest 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.

D. Standard III: Conflicts of Interest

Standard A defines as 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 only serves to undermine public or party confidence in the central integrity of the process.

The immediate duty of the mediator under this Standard 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 September 2004 Revision 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.

The September 2004 Revision explicitly acknowledges that how one conducts a conflicts check varies by service context (Comment 1). 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 Comment 2, public suggestions 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 and 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; the language of Comment 2 appears verbatim in the January 2004 Revised Version as Comment 3.

A mediator displays multiple analytical and interpersonal skills during a mediation and it is not surprising that a party who witnesses such talent might consider employing that mediator again. If the party desires to use that individual as a mediator in a subsequent, unrelated case, no immediate conflict of interest arises. But if the party wants to employ that individual in his or her business, or use that individual in a capacity not as a mediator but in another role (such as a personal lawyer, therapist, or consultant), then the individual serving as mediator must make certain that such a new relationship does not cast doubt about the integrity of the mediation process. The January 2004 Revised Version 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 September 2004 Revision and revised the language of its current Comment 3 to address this matter. Further, while Comment 3, unlike some other Codes, does not impose rigid time lines to regulate the development of such relationships, it does suggest that the amount of time that has elapsed is a factor to consider.

Comment 4 directly addresses the concern that mediators may experience conflicts of interest generated by personnel from appointing agencies or news media who exert various forms of direct or indirect influence on the mediator to press parties to settle in ways inconsistent with Standard I (Self-determination). Many factors can operate this way, intended or not: a program administrator might suggest 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 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.

E. Standard IV: Competence

Mediators operate in many contexts and reflect a broad range of backgrounds, trainings, and competencies. The September 2004 Revision 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 in order to promote public confidence in the integrity and usefulness of the process and in order 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, in Paragraph A, changes the 1994 Version to use the term, 'competence' in place of 'qualification.' Comment 1, in elaborating on Paragraph A, 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 a general 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.

Paragraph 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, Paragraph B imposes a duty on that mediator to take affirmative steps with the parties to arrange for the provision of adequate service (perhaps through hiring co-mediators with relevant competencies or the selection of an alternative mediator).

Public comments on the January 2004 Revised Version 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 Comment 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 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 prefatory statements regarding the relationship between the Standards and state law addressed this matter, together with its prefatory statement that the Standards are considered as blocks on which particular programs or service areas might build additional elements.

F. 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 a presumption 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 policy goals of the Uniform Mediation Act, it is not designed to match its substantive provisions and nuances in every dimension.

The thrust of Standard V is to impose a duty on the mediator not to share with others information obtained as a result of serving as a mediator; if the parties agree that the

mediator shall disclose it, the Standard states that the mediator may do so but is not required to do so. What is critical 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.

Some public comments to the January 2004 Revised Version 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 Preface 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 the accumulating urge to over regulate all aspects of mediation practice. The September 2004 Revision retains, in Comment 3, reference to recognized exceptions to the confidentiality reach and it deletes, pursuant to public comment, the term "acceptable" in describing a resolution.

G. 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 September 2004 Revision captures those elements in its statement of Paragraph A, incorporating from public comment a revision that requires a mediator to conduct a process that advances procedural fairness, not, as in the January 2004 Revised Version, "process fairness."

The Comments in the September 2004 Revision, prompted by public comment and further Joint Committee discussion, reflect several changes from the January 2004 Revision. In summary form, those changes include:

- a) Comment 1 from the January 2004 Revised Version read as follows: "A mediator should conduct a 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.
- b) Sequencing the Comments to reflect the presumptive order in which a mediator might confront these considerations in practice.
- c) Comment 5 begins with the sentence: "The primary purpose of a mediator is to facilitate the parties' decision-making." But for the last word, this language reflects that of the 1994 Version. The term, facilitate, is not designed to exclude any mediation style consistent with Standard I's commitment to support and respect the parties' decision-making roles in the process. Second, the words "decision-making" now replace "voluntary agreement" in order to reinforce the amended vision of Standard I that supports party self-determination to make decisions across a broad range of topics.
- d) Comment 8 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 January 2004 Revised Version, while included by oversight but actually reflecting the language contained in the

1994 Version, is completely unacceptable. Public comments have thoughtfully suggested a variety of possible clauses to address this situation; Comment 8 reflects the Joint Committee's judgment as to the best expression of the multiple commitments involved in such a situation.

e) The Joint Committee believes that developments in practice regarding the mediation of cases in which allegations of domestic violence arise must be addressed in any revision to the 1994 Version, and Comment 9 reflects that effort; public comments strongly endorsed amending the 1994 Version to address this topic. Some suggested that the provision contain a detailed prescription regarding the manner in which the mediator should screen participants, the requisite training to serve in such situations, and the like; the Joint Committee chose to retain the targeted, albeit general language of Comment 9, with the notion that Standards for particular programs might choose to build in more elaborate requirements.

H. 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 the September 2004 Revision highlights the complexity for a mediator to communicate effectively the nature of his or her services as a mediator and to be cognizant of how joining that service with any other role presents particular challenges. Comment 1 reaffirms the 1994 Version's commitment that a mediator must not include any promise as to outcome, and Comment 4 cautions a mediator not to list the names of clients or persons served without their permission.

I. Standard VIII: Fees and Other Charges

The September 2004 Revision amends the title of this Standard from the 1994 Version by adding the words, "and other Charges."

A significant, controversial development 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 fee 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 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. The Joint Committee believed that the danger of such a practice on process integrity at the practical level stems from two sources: 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 paid the higher percentage of the mediator's fee; second, where the unequal payment of fees was combined with the payer representing the primary or exclusive client of that mediator. For both situations, the Joint Committee believed that the appropriate stance of the Standards should, in the first instance, support

disclosure of the arrangement to all participants; further, the Standard and Comments should require the mediator to be attentive to how that practice, even when acceptable to all parties, impacts the integrity of the process. Comments 1 and 2 address these concerns.

The September 2004 Revision eliminates the proposed language of the January 2004 Revised Version 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.

J. Standard IX: Mediation Practice

The September 2004 Revision changes the title of this Standard from the 1994 Version, replacing "Obligations to the Process" with "Mediation Practice." The Joint Committee believes the proposed title more accurately reflects the Standard's intended focus of enhancing the quality of mediation practice.