MEDIATOR STANDARDS OF CONDUCT

OFFICE OF DISPUTE RESOLUTION
State Court Administrative Office
Michigan Supreme Court

Effective October 2023

Michigan Standards of Conduct for Mediators

Applicability.

These Standards of Conduct apply to cases managed under the Michigan Court Rules. Failure to comply with an obligation or prohibition imposed by a standard is a basis for removal of a mediator from a court roster under MCR 2.411(E)(4) and MCR 3.216(F)(4). The standards do not give rise to a cause of action for enforcement of a rule or for damages caused by failure to comply with an obligation or prohibition imposed by a standard. In a civil action, the admissibility of the standards is governed by the Michigan Rules of Evidence or other provisions of law.

Standard I. Self-Determination

A. A mediator shall conduct 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, including mediator selection, process design, and participating in or terminating the process.

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

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

3. A mediator shall continuously assess the capacity of the parties to mediate. A mediator shall make appropriate modifications to the process if there is concern about a party's ability to make voluntary and uncoerced decisions. A mediator shall terminate the mediation process when a mediator believes a party cannot effectively participate.

B. A mediator's commitment is to the parties and the mediation process. A mediator shall not undermine party self-determination for reasons such as obtaining higher settlement rates, ego satisfaction, increased fees, or outside pressures from court personnel, program administrators, provider organizations, or the media.

Standard II. Impartiality

A. A mediator shall conduct mediation in an impartial manner and avoid conduct that gives the appearance of partiality. "Impartial manner" means freedom from favoritism, bias, or prejudice in word, action or appearance, and includes a commitment to assist all participants.

1. A mediator should act with impartiality and without prejudice based on any participant's personal characteristics, background, values and beliefs, or performance during mediation.

2. A mediator should neither give nor accept a gift, favor, loan, or other item of value that raises a question as to the mediator's actual or perceived impartiality.

B. A mediator shall decline a mediation or withdraw from mediation if the mediator cannot conduct it in an impartial manner, regardless of the express agreement of the parties.

Standard III. Conflicts of Interest

A. A mediator should avoid a conflict of interest or the appearance of a conflict of interest both during and after mediation. A conflict of interest is a dealing or relationship that could reasonably be viewed as creating an impression of possible bias or as raising a question about the impartiality or self-interest on the part of the mediator.

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. The duty to make reasonable inquiry is a continuing duty during the mediation process.

C. A mediator shall promptly disclose conflicts of interest and grounds of bias or partiality reasonably known to the mediator. A mediator should resolve all doubts in favor of disclosure. Where possible, such disclosure should be made early in the mediation process and in time to allow the participants to select an alternate mediator. The duty to disclose is a continuing duty during the mediation process.

D. After disclosure, the mediator shall decline to mediate unless all parties choose to retain the mediator. If all parties agree to mediate after being informed of conflicts, the mediator may proceed with the mediation.

E. If a mediator's conflict of interest could be reasonably viewed as undermining the integrity of the mediation process, a mediator shall withdraw from or decline to proceed with the mediation regardless of the express agreement of the parties to the contrary.

F. A mediator shall not establish another relationship with any of the participants during the mediation process that would raise reasonable questions about the integrity of the mediation process, or impartiality of the mediator, without the consent of all parties.

G. In considering whether establishing a personal or another professional relationship with any of the participants after the conclusion of the mediation process might create a perceived or actual conflict of interest, the mediator should consider factors such as time elapsed since the mediation, consent of the parties, the nature of the relationship established, and services offered.

H. A mediator shall not use information about participants obtained in mediation for personal gain or advantage.

Standard IV. Mediator Competence

A. A mediator should be qualified by training, education, or experience to undertake a mediation. A mediator should make information regarding the mediator's training, education, experience, and approach to conducting mediation available to the parties.

B. If a mediator cannot conduct the mediation competently, the mediator shall advise the parties as soon as is practicable and take appropriate steps to address the situation, including, but not limited to, requesting appropriate assistance or withdrawing.

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

D. A mediator should attend educational and training programs, and engage in self-assessment and peer consultation to maintain and enhance the mediator's knowledge and skills related to mediation.

Standard V. Confidentiality

A. Consistent with MCR 2.412, a mediator shall maintain the confidentiality of information acquired by the mediator in the mediation process.

1. As soon as practicable and as necessary throughout the mediation process, the mediator should:

a. inform the participants of the mediator's obligations regarding confidentiality;

b. discuss with the parties their expectations of confidentiality; and

c. discuss confidentiality of private sessions with parties or participants prior to those sessions occurring.

2. The mediator should include a statement concerning the obligations of confidentiality in a written agreement to mediate.

B. If ordered or requested to testify or to produce documents, a mediator shall promptly inform the parties or their counsel. The mediator should consider confidentiality obligations in determining how to respond.

C. If a mediator participates in teaching, research, or evaluation of mediation, the mediator should protect the anonymity of the parties and abide by the obligations and agreements regarding confidentiality.

D. If a mediator, as authorized by law, court rule, or professional code of ethics, reveals information acquired in the mediation process, the mediator should consider the safety of persons at risk of physical harm by the release.

Standard VI. Safety of Mediation

A. Consistent with applicable statutes, court rules, and protocols, reasonable efforts shall be made throughout the mediation process to screen for the presence of an impediment that would make mediation physically or emotionally unsafe for any participant, or that would impede the achievement of a voluntary and safe resolution of issues. Examples of impediments to the mediation process include: domestic abuse; neglect or abuse of a child; status as a protected individual or vulnerable adult; and inability to understand or communicate in the language in which mediation will be conducted.

1. In general, "reasonable efforts" may include meeting separately with the parties prior to a joint session or administering screening tools.

2. In domestic relations cases, "reasonable efforts" should include meeting separately with the parties prior to a joint session and administering the "Mediator Screening Protocol" for domestic violence, published by the State Court Administrative Office.

3. If an impediment to mediation exists and cannot be overcome by accommodations that specifically mitigate it, the mediation process should not be continued unless:

    a. After being provided with information about the mediation process, a party at risk freely requests mediation or gives informed consent to it;

    b. The mediator has training, knowledge, or experience to address the impediment;

    c. The mediator has discussed with the party at risk whether an attorney, advocate, or other support person should attend the mediation; and

    d. The mediator has assessed that a party can determine and safely convey and advocate for his or her needs and interests without coercion, fear of violence, or other repercussions or consequences that would put the party at risk.

B. Where it appears that minor children or vulnerable adults may be affected by an agreement, a mediator should encourage participants to consider their safety.

Standard VII. Quality of the Process

A mediator shall conduct the mediation in a manner that protects the quality of the mediation process.

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

1. Diligence and timeliness. A mediator shall mediate in a diligent and timely manner.

a. A mediator should agree to mediate only when the mediator can commit the attention essential to an effective mediation.

b. A mediator should accept cases only when the mediator can satisfy the reasonable expectations of the parties concerning the timing of mediation.

2. Participants and participation. A mediator shall facilitate the presence of the appropriate participants and their understanding of the mediation process, continuously assess the parties' capacity to mediate, and structure the mediation process to facilitate the parties' ability to make decisions.

a. Subject to the provisions for accommodation in Standard VI and unless otherwise ordered by the court, the presence or absence of persons at a mediation should be determined by the parties and the mediator.

b. Mediation should be conducted pursuant to a written agreement to mediate that includes the mediator's fee, a description of the process, the role of the mediator, and the extent of confidentiality.

c. If a party appears unable to understand or communicate in the language in which mediation will be conducted, or appears to have difficulty comprehending the process, issues, or settlement options, or appears to have difficulty participating in mediation, 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 the mediator determines that a party does not have the capacity to mediate even with accommodations, modifications or adjustments, the mediator shall not continue the mediation process.

3. Procedural fairness. A mediator shall conduct mediation with procedural fairness.

   a. The mediator should provide participants with an overview of the process and its purpose, including distinguishing it from other processes, the consensual nature of mediation, the role of the mediator as an impartial facilitator who cannot impose or force settlement, the use of joint and separate sessions, and the extent of confidentiality.

   b. A mediator who has an obligation or policy to report suspected abuse or neglect of children or vulnerable adults should inform the participants of the obligation or policy to report at the first contact.

   c. The mediator should facilitate the acquisition, development, and disclosure of information to promote parties' informed decision-making.

   d. A mediator shall not knowingly misrepresent any material fact or circumstance in mediation.

   e. Where appropriate, the mediator should recommend that each party obtain independent legal advice before concluding an agreement.

4. Appropriateness of mediation. A mediator shall suspend or terminate the mediation process when the mediator reasonably believes that a participant is unsafe or unable to effectively participate in mediation or for other compelling reasons.

   a. If a mediator believes that mediation is being used to further illegal or criminal conduct, a mediator should take appropriate steps including, if necessary, postponing a mediation session, withdrawing from, or terminating the mediation.

   b. If the mediator suspends or terminates the mediation, the mediator should take reasonable steps to minimize danger, prejudice, or inconvenience to the parties or others that may result.

B. Role of the mediator: A mediator shall facilitate communication between the parties, assist in identifying issues, and help explore solutions to promote a mutually acceptable agreement. A mediator shall remain neutral as to terms of a settlement.

1. A mediator should not simultaneously act in the role of any other profession while mediating. Acting in the role of another profession before or after mediation may also pose a conflict of interest or affect the impartiality of a mediator.

2. A lawyer serving as a mediator shall inform unrepresented parties that the mediator is not representing them. When the lawyer serving as mediator knows or reasonably should know that a party does not understand the role of the

mediator in the matter, the mediator shall explain the difference between the role of a mediator and a lawyer's role in representing a client.

3. A mediator should inform the participants that they may obtain independent advice from other professionals.

4. A mediator may provide information that the mediator is qualified by training or experience to provide if the mediator can do so consistent with these Standards.

5. Where appropriate, a mediator may recommend that parties consider other dispute resolution processes.

6. A mediator may undertake an additional dispute resolution role in the same matter, if the mediator:

   a. informs the parties of the implications of the change in process;

   b. receives the informed consent of the parties; and

   c. can do so consistent with these Standards.

7. A mediator shall not conduct a dispute resolution procedure other than mediation but label it mediation in an effort to gain the protection of rules, statutes, or other governing authorities pertaining to mediation.

Standard VIII. Advertising and Solicitation

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

B. A mediator should not claim to meet the mediator qualifications of a governmental entity or private organization unless that entity or organization has a recognized procedure for qualifying mediators and it grants such status to the mediator.

C. A mediator shall not use the names of persons served, without their permission, in promotional materials or other forms of communication.

Standard IX. Fees and Other Charges

A. A mediator shall provide each party or each party's representative information about mediation fees, expenses, and any other actual or potential charges that may be incurred in connection with a mediation.

   1. If a mediator charges fees, the mediator should develop them in light of all relevant factors, including the type and complexity of the matter, the qualifications of the mediator, and the time required.

2. A mediator should provide fee information early in the mediation process.

3. A mediator's fee arrangement should be in writing.

B. A mediator shall not charge or accept fees in a manner that impairs or may appear to impair a mediator's impartiality.

1. A mediator shall not enter into a fee agreement that is contingent upon the result of the mediation or amount of the settlement.

2. A mediator may accept unequal fee payments from the parties unless the fee arrangement would adversely impact the mediator's ability to conduct a mediation in an impartial manner.

Standard X. Advancement of Mediation Practice

A. A mediator should act in a manner that advances the practice of mediation. A mediator promotes this standard by:

1. Fostering diversity within the field of mediation.

2. Striving to make mediation accessible to those who elect to use it, including providing services at a reduced rate or on a pro bono basis, as appropriate.

3. Participating in research when given the opportunity, including obtaining participant feedback, when appropriate.

4. Participating in outreach and education efforts to assist the public in developing an improved understanding of, and appreciation for, mediation.

5. Assisting mediators through training, mentoring, and networking.

6. Participating in programs of self-assessment and peer consultation.

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

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