

COMMERCIAL DIVISION

SUPREME COURT, NEW YORK COUNTY



HON. JACQUELINE W. SILBERMANN
ADMINISTRATIVE JUDGE
SUPREME COURT, CIVIL BRANCH,
NEW YORK COUNTY

JUSTICES OF THE COMMERCIAL DIVISION:
JUSTICE EILEEN BRANSTEN JUSTICE HERMAN CAHN
JUSTICE HELEN E. FREEDMAN JUSTICE BERNARD J. FRIED
HON. IRA GAMMERMAN (JHO) JUSTICE RICHARD B. LOWE III
JUSTICE CHARLES E. RAMOS

ALTERNATIVE DISPUTE RESOLUTION PROGRAM

STANDARDS OF CONDUCT FOR MEDIATORS

The following Standards of Conduct shall govern all who serve as mediators in cases that undergo mediation pursuant to the Rules ("the ADR Rules") of the Alternative Dispute Resolution Program of the Commercial Division, Supreme Court, New York County ("the ADR Program").¹ Separate Standards of Conduct for Arbitrators and Neutral Evaluators have been issued.

The ADR Program aims to provide an alternative to the formal litigation process that is sound, fair, efficient, expeditious, and inexpensive. To achieve this objective, the Program must have the confidence of the Bar and the public. All activities undertaken pursuant to the ADR Rules will reflect upon the Commercial Division and the court system as a whole. Therefore, the Program must be marked at all times by the highest possible standards of integrity, honesty, fairness, openness, intelligence, and diligence.

STANDARD I SELF-DETERMINATION

A mediator should recognize that mediation is based on the principle of self-determination.

Self-determination is the fundamental principle of mediation. Mediation is built upon the ability and right of the parties to communicate, assess facts, events, and issues, and make choices for themselves, and, if they wish, to reach an agreement, voluntarily and free of coercion.

¹ In these Standards, the Commercial Division has sought to tailor to the particular characteristics of the Program and to implement standards that have gained national recognition and wide acceptance among ADR neutrals, Judges, court administrators, the Bar, and members of the public utilizing these processes. These Standards have been derived from the Model Standards of Conduct for Mediators, a product of the joint labors of the American Bar Association, the American Arbitration Association, and the Society of Professionals in Dispute Resolution.

Ethical Considerations

1. As set forth in Standard VI, a mediator should provide information about the process to the parties. The primary role of the mediator is to foster dialogue and, when desired by the parties, facilitate a voluntary resolution of a dispute. A mediator may identify issues and help parties to communicate and explore options. A mediator should never do anything to undermine an atmosphere of free exchange of views and ideas, or to coerce an agreement.

2. The mediator may facilitate the parties' own engagement in assessment of risks or analysis of legal positions, in private discussions ("the caucus") or in joint sessions, if that will assist the parties to understand options fully. A mediator may also, where appropriate, provide an assessment of the risks associated with litigation or other binding processes.

3. A mediator should encourage balanced discussion and discourage intimidation by either party. A mediator should work to promote each party's understanding of and respect for the perspective, interests, feelings, concerns, and position of each of the other parties, even if they cannot agree.

4. A mediator cannot personally ensure that each party has made a fully informed choice to reach a particular agreement. However, a party in the ADR Program will normally be represented by counsel and the mediator should provide full opportunity to parties and their attorneys to consult with each other and, if necessary, for both to consult with outside professionals.

5. If the mediator discovers an intentional abuse of the process, the mediator may discontinue the process.

STANDARD II IMPARTIALITY

A mediator should conduct the mediation in an impartial manner.

A mediator should act at all times with the utmost of impartiality and evenhandedness. A mediator should mediate only those matters in which he/she can remain impartial and evenhanded. The mediator should withdraw if unable to do so at any time.

Ethical Considerations

1. A mediator should avoid all conduct that gives the appearance of partiality toward one of the parties. A mediator should avoid favoritism or prejudice based on the parties' background, prominence, personal characteristics, economic importance, performance at the mediation, or any other factors. The quality of the mediation process is enhanced and the reputation of the Program protected when the parties have confidence in the impartiality of the mediator.

2. The principle of impartiality does not prohibit the mediator from engaging in caucuses in accordance with these Standards as part of the mediation process.

STANDARD III CONFLICTS OF INTEREST

A mediator should decline any appointment if acceptance would create a conflict of interest. Before accepting an appointment, a mediator should disclose all potential conflicts of interest. After such disclosure, the mediator may accept the appointment if all parties so request. The mediator should avoid conflicts of interest during and even after the mediation.

A mediator offered an appointment in a case should comply with the ADR Rules regarding conflicts of interest. A mediator should review his/her past or present professional and other relationships, including with attorneys for parties and parents, subsidiaries, and affiliates of corporate parties, and should decline the appointment if the review reveals the existence of a conflict of interest. Consistent with the principle of self-determination by mediating parties, a mediator who contemplates accepting an appointment should disclose to all parties all potential conflicts of interest that could reasonably be seen as raising a question about impartiality. If in doubt, the mediator should err on the side of disclosure. If all parties agree to mediate after such disclosure, the mediator may proceed. If, however, the conflict of interest or potential conflict would cast serious doubt on the integrity of the process or the Program, the mediator should decline the appointment.

A mediator should avoid conflicts of interest during and even after the mediation. Before or during the mediation the mediator should not discuss with any party future retention in any capacity.

Ethical Considerations

1. If, during a mediation, the mediator discovers a conflict, the mediator should notify the Program Administration and counsel. Unless the mediator, the parties, and the Program Administration all give their informed consent to the mediator's continuation and continuation would not cast serious doubt on the integrity of the process or the Program, the mediator should withdraw.

2. A mediator should not recommend the services of particular professionals to assist the parties and counsel in the mediation unless a request for a recommendation is made jointly by all parties and provided that in so recommending the mediator does not engage in a conflict of interest. A mediator may make reference to professional referral services or associations that maintain rosters of qualified professionals.

STANDARD IV COMPETENCE

A mediator should mediate only when he/she has the qualifications necessary to satisfy the reasonable expectations of the parties.

In principle, any person may be selected as a mediator, provided that the parties are satisfied with the mediator's qualifications. However, training and experience are necessary for effective mediation. All members of the Panel of Mediators should comply with the Division's training standards. Parties in the Program are free to utilize mediators not listed in the Panel. Any person who offers to serve as mediator in a case represents that he/she has the training and competency to mediate effectively. If the mediator in fact lacks that ability, due to the complexity or difficulty of the matter or other factors, the mediator should decline the appointment.

STANDARD V CONFIDENTIALITY

A mediator should comply with the ADR Rules regarding confidentiality and should respect the reasonable expectations of the parties on that subject.

The ADR Rules provide for confidentiality in mediation, recognizing that confidentiality is essential to the process. Mediators should at all times comply with these Rules. The parties' expectations of confidentiality generally depend on the Rules and any other rules or law providing for confidentiality, the circumstances of the mediation, and agreements they may make. The parties may provide for additional levels of confidentiality beyond that guaranteed in the Rules and such agreement should be respected. The mediator should not disclose any information that a party, in accordance with the foregoing, reasonably expects to be confidential unless given permission by the confiding party or required by law or authorized by the Rules.

Ethical Considerations

1. At the outset, the mediator should explain to all parties the principle of confidentiality, with regard to both joint sessions and caucuses.

2. If a party conveys to the mediator in a caucus information that the mediator knows or believes the other party to the case does not possess, the mediator should exercise the utmost diligence to prevent revelation of that information to the other party unless the communicating party has specifically agreed to disclosure.

3. A mediator should not disclose confidential information to the Program Administration or the assigned Justice, including with regard to the merits of the case, settlement offers, and how the parties acted in the process, except that, as provided in the ADR Rules, the mediator may report violations of the Rules to the Administration.

4. Confidentiality should not be construed to prohibit effective monitoring or evaluation of the Program by the Program Administration. Thus, a mediator may report to the Administration, in general terms, whether the process is continuing and the future schedule for the proceeding. Under appropriate circumstances, the Program Administration may allow researchers access to general statistical data and, with the specific permission of all parties, individual case files, observations of live mediations, and interviews with participants. Similarly, mentors and trainees may observe live mediations, but only with permission of all parties and subject to the ADR Rules on confidentiality.

5. A mediator should not, at any time, use confidential information acquired during the ADR process to gain personal advantage or advantage for others, or to affect adversely the interests of another.

STANDARD VI QUALITY OF THE PROCESS

A mediator should conduct the mediation fairly, diligently, and in a manner consistent with the principle of self-determination.

A mediator should work to ensure a process of high quality. This requires a commitment by the mediator to fairness, diligence, sensitivity toward the parties, and maintenance of an atmosphere of respect among the parties. The mediator should guarantee that there is adequate and fair opportunity for counsel and each party to participate in discussions. The mediator should observe deadlines and handle his/her responsibilities with diligence and expedition. The parties decide when and under what conditions they will reach an agreement.

Ethical Considerations

1. A mediator should agree to accept an appointment only when able to commit the time and attention essential to a fair and effective process. If the mediator may be too busy with other matters to do so, then the proposed appointment should be declined. If after acceptance of the appointment, circumstances develop that prevent the mediator from serving, the mediator should withdraw. Withdrawal may cause significant inconvenience for the parties; therefore, the mediator should exercise diligence to determine availability in advance of commencement of the proceeding.

2. A mediator should ensure that deadlines set forth in the ADR Rules are adhered to and shall keep the Program Administration informed about the schedule for the process. A mediator should not allow a mediation to be delayed and should consult with the Administration if the process is being delayed.

3. A mediator should treat parties and counsel with sensitivity, civility and respect and should encourage parties and counsel to treat each other in the same way. A mediator should

foster cooperation and work to build reasonable trust among the parties in the process. A mediator should provide all counsel and parties with an adequate and fair opportunity to state positions, opinions and interests.

4. The primary purpose of the mediator is to facilitate communication by or among the parties, their development and assessment of options, and a voluntary agreement. A mediator should refrain from providing professional advice and should at all times distinguish between the roles of mediator and adviser. A mediator may, when appropriate, recommend that counsel and parties seek outside professional advice or consider resolving the dispute through arbitration, counseling, neutral evaluation, or other processes. A mediator who at the request of the parties agrees to undertake an additional dispute resolution role in the same matter is governed by other Standards of Conduct.

5. A mediator should explain to all participants at the outset of the process the procedures that will be followed in the process and what the mediator's role will be, including, insofar as practical, the extent to which the mediator will undertake an evaluative function. (Within the ADR field, there are differences of view as to whether, when, and to what degree a mediator may assume an evaluative approach.) The mediator should make reasonable efforts during the process to explain to the parties the mediator's role and these procedures.

6. A mediator should withdraw from a mediation or postpone a session if the mediation is being used to further illegal activity, or if a party or counsel is unable to participate due to physical or mental incapacity. Where authorized by the Rules or required by law a mediator may or shall disclose to appropriate authorities illegal or unprofessional activity being engaged in or threatened by a party to the mediation or counsel.

7. A mediator's behavior should not be distorted by a desire for a high settlement rate.

8. A mediator should be mindful of the needs of persons with disabilities, including but not limited to, obligations under the Americans with Disabilities Act.

STANDARD VII COMPENSATION

At the outset of the mediation, the mediator shall explain the rules governing compensation, which are set forth in the ADR Rules. A mediator should not seek compensation in other circumstances.

At present, the Program provides for an initial mandatory mediation session or sessions totaling four hours (excluding time spent in arranging and preparing for the mediation). At

the conclusion of the four hours, any party may bring the mediation process to an end. If the parties agree to continue, the Panel mediator shall be compensated as provided in the rules. The Rules also govern compensation paid to a Panel mediator who is selected by the parties as substitute for a mediator designated by the ADR Coordinator. All Panel mediators shall comply with these Rules. The mediator shall explain these rules to the parties and counsel before the mediation begins.

Ethical Considerations

1. A Panel mediator who accepts an appointment should not, directly or indirectly, request from the parties any compensation other than as provided in the ADR Rules.
2. A mediator should not accept a fee or other benefit for referral of a matter to anyone.
3. A mediator who joins the Panel should provide ADR services in accordance with the ADR Rules. Such a mediator should not unreasonably decline to accept appointments upon request of the Program Administration. If the standards of compensation set forth in the Rules are not considered satisfactory by the mediator, he or she shall withdraw from the Panel.

STANDARD VIII OBLIGATIONS TO THE MEDIATION PROCESS

Mediators are regarded as knowledgeable about the process of mediation. They should use their expertise to help educate the public about mediation; to make mediation accessible to those who would like to use it; to correct abuses; and to improve their professional skills and abilities. Mediators should cooperate with efforts of court administrators to promote adequate professional skills among those who function as mediators. When serving in the Program, mediators should conduct themselves so as to protect and promote the integrity and standing of the Program.

Dated: June 15, 2008

**HON. JACQUELINE W. SILBERMANN
ADMINISTRATIVE JUDGE**