

# **Ethics Guidelines For Mediators**

## **INTRODUCTION**

The purpose of these Ethics Guidelines is to provide basic guidance to ADRSI mediators regarding ethical issues that may arise during or related to the mediation process. Mediation is a voluntary, non-binding process using a neutral third party to help the parties reach a mutually beneficial resolution of their dispute. A mediator helps the parties reach a resolution by facilitating communication, promoting understanding, assisting them in identifying and exploring issues, interests and possible bases for agreement, and in some matters, helping parties evaluate the likely outcome in court or arbitration if they cannot reach settlement through mediation.

Mediation is by its nature a fluid and flexible process. ADRSI mediators are not expected to adhere to any one process or approach, and are encouraged to rely on their creativity and experience to tailor each mediation as much as appropriate to meet the needs of the participants.

Many other sets of guidelines exist, such as those issued by the Society of Professionals in Dispute Resolution (SPIDR), The Joint AAA/ABA/SPIDR Committee on Standards of Conduct, the ABA Family Law Section and various state and local programs. ADRSI mediators may wish to review these for informational purposes. Copies of each, as well as other relevant reference materials, are kept in each ADRSI office.

These Guidelines are national in scope and are necessarily general. They are not intended to supplant applicable state or local laws or rules. All ADRSI mediators should be aware of applicable state statutes or court rules that may apply to the mediations they are conducting. In the event that these Guidelines are inconsistent with such statutes or rules, the mediators must comply with the applicable law.

Attorney mediators in particular should also be aware of state-specific rulings or guidance as to whether and in what circumstances mediation may be considered the practice of law. These rulings may have an impact on a mediator's practice in such respects as advertising and co-mediating with non-attorneys. In addition, mediators who are former judges should be aware of any state ethical standards or canons of judicial conduct regulating or guiding their efforts as mediators. Other professionals, such as licensed

psychologists, also may have similar standards of conduct that may affect their mediation practice.

ADRSI strongly encourages its mediators to confront directly any ethical issues that arise in their cases as soon as the issue becomes apparent, and to seek advice on how to resolve such issues from the Regional Management Team.

## **GUIDELINES**

### **I. A MEDIATOR SHOULD ENSURE THAT ALL PARTIES ARE INFORMED ABOUT THE MEDIATOR'S ROLE AND NATURE OF THE MEDIATION PROCESS, AND THAT ALL PARTIES UNDERSTAND THE TERMS OF SETTLEMENT.**

A mediator should ensure that all parties understand and agree to mediation as a process, the mediator's role in that process and all parties' relationship to the mediator. The parties should also understand the particular procedures the mediator intends to employ, including whether and in what manner the mediator may help the parties evaluate the likely outcome of the dispute in court or arbitration if they cannot reach settlement through mediation. In addition, a mediator should be satisfied that the parties have considered and understood the terms of any settlement, and should, if appropriate, advise the parties to seek legal or other specialized advice.

If the mediator perceives that a party is unable to give informed consent to participation in the process or to the terms of settlement due to, for example, the impact of a physical or mental impairment, the process should not continue until the mediator is satisfied that such informed consent has been obtained from the party or the party's duly authorized representative.

In the event that, prior to or during a mediation session, it becomes appropriate to discuss the possibility of combining mediation with binding arbitration, the mediator should explain how a mediator's role and relationship to the parties may be altered, as well as the impact such a shift may have on the disclosure of information to the mediator. The parties should be given the opportunity to select another neutral to conduct the arbitration procedure.

### **II. A MEDIATOR SHOULD PROTECT THE VOLUNTARY PARTICIPATION OF EACH PARTY.**

The right of the parties to reach a voluntary agreement is central to the mediation process. Consequently, a mediator should act and conduct the process in ways that maximize its voluntariness.

In most cases that are not court-ordered, parties to the mediation process arrive willing and able to engage in assisted negotiation. On infrequent occasions, however, a mediator may perceive that a party is being forced into and/or through the process, for example, by a family member or representative. In that event, a mediator should explore carefully with that party and the other parties, within the bounds of discretion and confidentiality, whether the mediation process should proceed, and, in any case, strive to ensure that the concerns of the reluctant party regarding the process are fully addressed.

Court-ordered mediation often carries an aspect of involuntariness into the process. A mediator should be sensitive to this dynamic and assure the parties that although they have been ordered to attend the mediation, a settlement can be reached only if it is to their mutual satisfaction.

### **III. A MEDIATOR SHOULD BE COMPETENT TO MEDIATE THE PARTICULAR MATTER.**

A mediator should have sufficient knowledge of relevant procedural and substantive issues to be effective. It is the mediator's responsibility to prepare before the mediation session by reviewing any statements or documents submitted by the parties. A mediator should refuse to serve or withdraw from the mediation if the mediator becomes physically or mentally unable to meet the reasonable expectations of the parties.

### **IV. A MEDIATOR SHOULD MAINTAIN THE CONFIDENTIALITY OF THE PROCESS.**

It is crucial that the mediator and all parties have a clear understanding as to confidentiality before the mediation begins. Before a mediation session begins, a mediator should explain to all parties (a) any applicable laws, rules or agreements prohibiting disclosure in subsequent legal proceedings of offers and statements made and documents produced during the session, and (b) the mediator's role in maintaining confidences within the mediation and as to third parties.

A mediator should not disclose confidential information without permission of all parties or unless required by law, court rule or other legal authority. A mediator must not use confidential information acquired during the

mediation to gain personal advantage or advantage for others, or to affect adversely the interests of others. If the mediation is being conducted under rules or laws that require disclosure of certain information, a mediator should notify the parties prior to beginning the mediation session. In addition, a mediator's notes, the parties' submissions and other documents containing confidential or otherwise sensitive information should be stored in a reasonably secure location and may be destroyed 90 days after the mediation has been completed or sooner if all parties so request or consent.

#### **V. A MEDIATOR SHOULD CONDUCT THE PROCESS IMPARTIALLY.**

A mediator should remain impartial throughout the course of the mediation. A mediator should be aware of and avoid the potential for bias based on the parties' backgrounds, personal attributes, or conduct during the session, or based on any pre-existing knowledge of or opinion about the merits of the dispute being mediated. A mediator should endeavor to provide a procedurally fair process in which each party is given an adequate opportunity to participate. If a mediator becomes incapable of maintaining impartiality, the mediator should withdraw promptly.

A mediator should disclose any information that reasonably could lead a party to question the mediator's impartiality. A mediator may proceed with the process unless a party objects to continuing service. A mediator should withdraw if a conflict of interest exists that casts serious doubt on the integrity of the process.

After a mediation is completed, a mediator should refrain from any conduct involving a party, insurer or counsel to the mediation that reasonably would cast doubt on the integrity of the mediation process, absent disclosure to and consent by all parties to the mediation. This does not preclude the mediator from serving as a mediator or in another dispute resolution capacity with a party, insurer or counsel involved in the prior mediation.

A mediator should exercise caution in accepting items of value, including gifts or payments for meals, from a party, insurer or counsel to a mediation during or after a mediation, particularly if the items are accepted at such a time and in such a manner as to cast doubt on the integrity of the mediation process.

A mediator should also avoid conflicts of interest in recommending the services of other professionals. If a mediator is unable to make a personal recommendation without creating a potential or actual conflict of interest,

the mediator should so advise the parties and refer them to a professional referral service or association.

The ADRSI Conflict Of Interest Policy provides additional information regarding restricted conduct and should be adhered to by a ADRSI mediator.

## **VI. A MEDIATOR SHOULD REFRAIN FROM PROVIDING LEGAL ADVICE.**

A mediator should ensure that the parties understand that the mediator's role is that of neutral intermediary, not that of representative of or advocate for any party. A mediator should not offer legal advice to a party. If a mediator offers an evaluation of a party's position or of the likely outcome in court or arbitration, or offers a recommendation with regard to settlement, the mediator should ensure that the parties understand that the mediator is not acting as an attorney for any party and is not providing legal advice.

A mediator should be particularly sensitive to role differences if any party is unrepresented by counsel at the mediation and should explain carefully the limitations of the mediator's role and obtain a written waiver of representation from each unrepresented party. If a mediator assists in the preparation of a settlement agreement and if counsel for any party is not present, the mediator should advise each unrepresented party to have the agreement independently reviewed by counsel prior to executing it.

A mediator should make an effort to keep abreast of developments within the mediator's jurisdiction concerning what constitutes the practice of law. Different bar associations have issued conflicting opinions about whether and when a mediator engages in the practice of law, and certain states or courts have rules regarding how and in what manner a mediator may evaluate the merits of a dispute.

## **VII. A MEDIATOR SHOULD WITHDRAW UNDER CERTAIN CIRCUMSTANCES.**

A mediator should withdraw from the process if the mediation is being used to further illegal conduct, or for any of the reasons set forth above: lack of informed consent, a conflict of interest that has not or cannot be waived, a mediator's inability to remain impartial, or a mediator's physical or mental disability. In addition, a mediator should be aware of the potential need to withdraw from the case if procedural or substantive unfairness appears to have undermined the integrity of the mediation process.

**VIII. A MEDIATOR SHOULD AVOID MARKETING THAT IS MISLEADING AND SHOULD NOT GUARANTEE RESULTS.**

A mediator should ensure that any advertising or other marketing conducted on the mediator's behalf is truthful. A mediator should not guarantee results, especially if such guarantee could be perceived as favoring one type of disputant or industry over another.