



“People Skills” and Mediation Improving Communication and Avoiding Chaos

April 15, 2015 – 2:00 p.m. to 3:30 p.m. ET

PROGRAM SUMMARY

Speaker: Gregory D. Hoffmann, Esq.

This webinar will demonstrate how mediators are leaders, not advocates and the importance of leadership skills in mediation. It will discuss how to identify leaders, categorize mediation behaviors and evaluate the use of leadership “probes” to manage mediation. Finally, it will discuss new resources to help improve the audience’s mediation leadership skills.

AGENDA

2:00 p.m.	Welcome and Introduction of Speakers	(5 minutes)
2:05 p.m.	Defining Leadership Identifying Leaders and Key Decision Makers Role of Attorneys, Negotiators and Mediators The Mediation Model Q4 Model Overview Message Interpretation Dimensional Model of Behavior Q1 “Combative” Behavior Q2 “Passive” Behavior Q3 “Congenial” Behavior Q4 “Pragmatic” Behavior Negotiating Behaviors and Tactics Impact of Behavior Using Probes Using Statements	(75 Minutes)
3:20 p.m.	Conclusion and Questions	(10 minutes)
3:30 p.m.	Evaluation	(5 minutes)
3:35 p.m.	Adjourn	



Gregory D. Hoffmann, Esq.
Hoffmann Mediation

Current Employer-Title	Hoffmann Mediation - Principal and Owner
Mediation Profession	Hoffmann Mediation - Principal and Owner
Work History	Principal and Owner, Hoffman Mediation, 2007-present; President and Owner, Hoffmann Consulting Services LLC, 2006-2012; CEO and Co-Owner, The ME Companies, 1995-06; Partner and Shareholder, Green, Hoffmann & Dankenbring, 1976-96. Former Assistant Attorney General - State of Missouri
Experience	<p>Unique experience as career involves serving as (i) a practicing Commercial, Securities, Franchise, Intellectual Property and Business attorney and litigator and (ii) the CEO/co-owner of a privately-held group of companies involved in the world-wide licensing of intellectual property, including software, publishing and animated film. Experience has provided a thorough understanding of commercial and business litigation, process and procedure in both a legal and corporate context.</p> <p>As an attorney and litigator, spent over 25 years handling commercial, intellectual property, securities, commodities, franchise and other business disputes in various courts throughout the United States. Among other matters, has (i) been co-lead counsel in multi-district class action securities matters, (ii) tried patent and other intellectual property matters, (iii) represented the franchisee/master regional franchisor of a large, nationally known franchise operation in both the growth and development of their franchises, and franchising within their exclusive territories, (iv) represented publicly-traded and privately-held businesses, shareholders, and employees in numerous corporate, commercial and business contexts, (v) represented franchisees and franchisors in matters related to licensing, disclosure, contract fulfillment; intellectual property protection, trade secrets, confidentiality, regulatory and standards review and enforcement, franchisee performance and termination, franchise territorial restrictions and disputes, franchise transfers and retained liabilities, employment, real estate issues and supply chain disputes, and (vi) represented banks, trust companies and professionals in litigation matters involving negligence, fraud and breach of contract.</p> <p>As a corporate CEO, developed and managed a group of privately-held companies involved in nearly every aspect of Intellectual Property licensing, publishing and product and software development. Under management, the company developed a chain of retail stores, an animated movie and published a national magazine with 500k+ net paid circulation. Operations spanned the United States, involved hundreds of employees and licensees and achieved brand lifetime retail sales in excess of US \$1 billion. Among other awards, company was named Entrepreneur of the Year in 1998.</p> <p>Has also been a regular speaker and teacher in the Licensing University sponsored by the Licensing Industry Manufacturer's Association (LIMA) at its annual licensing trade conference. Though serving as a full-time neutral, also continues to</p>

work as a consultant in licensing, developing emerging properties in product development, animation and publishing. For additional information, please visit: www.hoffmannconsulting.com.

In addition to the forgoing, experienced in the following areas of civil law: Antitrust; Appellate; Arts; Banking & Finance; Commercial/Business; Commodities; Commercial Litigation; Contract Disputes; Consumer Fraud; Copyright; Debt/Bankruptcy; EEOC; Employment; Entertainment; FLSA; Franchise; Insurance; Intellectual Property; Landlord/Tenant; Legal Malpractice; Media & Communications; Native American Rights; Business Negligence; Non-Profit Organizations; Partnerships; Patents; Professional Fees; Real Estate; Securities; Technology; Title VII; Trade Dress; Trademark.

Experience as a Mediator

Experienced as a litigator, corporate executive and educator, particularly in the area of intellectual property, licensing, franchising and other corporate and commercial litigation. Matters mediated to date include: issues related to construction contracts and non-performance, insurance and reinsurance matters and other corporate contractual matters. In addition, has (i) counseled parties in mediation in an intellectual property dispute concerning licensing and agency rights, and (ii) developed and delivered a workshop on leadership communication skills for mediators for the Florida Supreme Court Dispute Resolution Conference.

Representative Issues Handled as a Mediator

Mediator experience includes: (a) matters involving product installation contracts and scope and timing of performance; (b) matters involving termination of construction contracts and return of deposits; and (c) matters involving insurance and re-insurance in failure to provide health insurance benefits. Has also counseled parties in a recent mediation concerning a dispute over licensing and agency rights to certain copyrights and trademarks in the US and other countries.

Years of Practice as a Mediator

1

Total Number of Cases Mediated

10

Mediation Experience as an Advocate or Party

Unique experience, having been both a litigator and a party in mediation proceedings. Examples include: (a) securities dispute involving improper trading in an account; (b) franchise dispute between franchisor and franchisee concerning terms and conditions of agreement; (c) matter relating to anti-competitive and unfair trade practices in product distribution; (d) licensing dispute concerning scope and breadth of exclusive product and territory grant of rights; (e) dispute concerning scope of trademark and trade dress in retail operations; and (f) contract dispute concerning scope of construction contract work.

Mediation Philosophy

Mediation is a process designed to assist parties in the resolution of disputes. My experience as a litigation attorney and a corporate executive lead me to believe that, absent underlying motives, most parties desire to resolve their differences without resort to further proceedings. The primary job of the mediator is to assure that all parties have clearly enunciated their best alternatives to litigation, that each party understands the parameters of those alternatives and that each party has the opportunity to determine whether those parameters are reasonable, best alternatives

to further proceedings. Resolution occurs when all parties discover and adopt their best alternatives to further litigation.

In this process, a mediator acts as a leader, not an advocate, assisting the parties in developing and clearly enunciating their proposals. Mediation is not a process involving pushing or brow-beating parties to settlement. Rather, using good leadership communication skills, mediators can diffuse emotional differences, assist the parties in evaluating their options, and help them to understand their alternatives and evaluate them in light of their option to continue litigation or other proceedings.

Parties are expected to come prepared and to have a key decision maker present at the mediation proceeding. Prior to any mediation, each party will provide a confidential memo (i) outlining the party's views of the critical issues for resolution, (ii) a brief list key facts that support the party's position and (iii) any specific legal issues and citations that may be relevant to resolution. This memo is kept strictly confidential between the mediator and the providing-party. A specific outline of mediation procedures will be provided prior to meeting or will be provided in advance.

Mediation References

Cary Singletary, carysingletary@aol.com, (813) 301-9339; Melvin Rubin, mrubin@melrubin.com, (305) 446-4630; William Christopher, wchristopher@sarasotalaw.com, (941) 952-5042; additional references available upon request.

Alternative Dispute Resolution Training

AAA Developments in Arbitration Law: Non-Signatories, Discovery and Vacatur, 2014; AAA The Impact of Social Media on Evidence: What Arbitrators Need to Know, 2014; AAA Arbitrator Boundaries What are the Limits of Arbitrator Authority, 2013; AAA How to Become a More Innovative Neutral or Advocate: Applying Cutting Edge Innovation Management Techniques to Your ADR Practice, 2012; Faculty, AAA Controlling Chaos in Mediation: Navigating the Behavioral Paradigm, 2012; AAA Best Practices in Franchise Arbitration, 2011; AAA Chairing an Arbitration Panel: Managing Procedures, Process & Dynamics (ACE005), 2011; AAA/ICDR Neutrals Conference, 2010; AAA Arbitration Awards: Safeguarding, Deciding & Writing Awards (ACE001), 2009; AAA Arbitration Fundamentals and Best Practices for New Arbitrators, 2009; Florida Supreme Court Arbitration Training, 2008; Florida Supreme Court Dispute Resolution Center, DRC Annual Conference, 2008; FINRA Training, 2008; University of South Florida, Circuit Civil Mediation Training, 2008.

Professional Licenses

Admitted to the Bar: Florida; Missouri (inactive); Alaska (inactive); U.S. District Court, Eastern District of Missouri, Middle District of Florida; U.S. Court of Appeals, Eighth Circuit; U.S. Court of Claims.

Professional Associations

Florida Bar Association; Missouri Bar Association; Alaska Bar Association; American Bar Association; Sarasota County Bar Association.

Education

Purdue University (BS, Economics with honors-1971); Washington University (JD, Honors Scholar-1974).

Awards and Honors

Companies named Entrepreneur of the Year (co-owner and CEO) in the category

of Creative Arts by Ernst & Young, 1998; other awards for Community Service from various non-profit groups.

Publications and Speaking Engagements

1. Speaker, "Current Ethical Considerations for Mediators and Arbitrators," Sarasota County Bar Association, 2011.
2. "Applying Principles of Leadership Communication to Improve Mediation Outcomes," DISPUTE RESOLUTION JOURNAL, American Arbitration Association, Fall 2009.
3. Lecturer and trainer at numerous Homestead Foreclosure Mediation training seminars sponsored by the American Bar Association in Broward and Dade County, Florida, 2010.
4. Lecturer and trainer at Homestead Foreclosure Mediation Seminar, sponsored by the Florida 12th Judicial Circuit, 2010.
5. "Mediation from a Business Perspective: Applying Principles of Leadership Communication to the Role of the Mediator," Annual Florida Supreme Court Dispute Resolution Conference in Orlando, Florida. This program has also been delivered at the University of Miami School of Law and the Sarasota County Bar Association.
6. "Effective Strategic Planning in IP Licensing," THE LICENSING JOURNAL, Fall 2006; a business and legal journal related to intellectual property licensing.
7. Professor, Graduate Business School, Webster University, St. Louis, Missouri, St. Petersburg and Sarasota, Florida, 2006-present; Senior Professor, Keller Graduate School of Management, Tampa, Florida, 2007-present.
8. Visiting Professor, University of Trinidad and Tobago, 2007.
9. "Entrepreneurship Pedagogy in Global Settings" a workshop delivered at the annual conference of the United States Association of Professors of Small Business Entrepreneurship (USASBE) in 2008.

**Citizenship
Locale**

United States of America
Longboat Key, Florida, United States of America

Compensation

Hearing:	\$250.00/Hr
Study:	\$0.00/Hr
Travel:	\$0.00/Hr
Cancellation:	\$250.00/Hr
Cancellation Period:	2 Days
Comment:	

Applying Principles of Leadership Communication to Improve Mediation Outcomes

BY GREGORY D. HOFFMANN

Greg Hoffmann has practiced law for over 25 years in the fields of intellectual property, licensing, corporate and securities law and complex commercial litigation. A Florida Certified Circuit Civil Court and a federal court mediator, he also serves on the panels of the American Arbitration Association and the Financial Industry Regulatory Authority (FINRA). He can be reached by e-mail at greg@hoffmannmediation.com. His Web site is www.hoffmannmediation.com.

This article suggests that mediators should develop leadership abilities and an understanding of human behavior in order to work productively with difficult parties. Mediators need to understand why parties and counsel behave as they do in mediated negotiations—why some make ultimatums, others are unwilling to commit, and others are ready to agree to any offer. This article suggests that the Q4 Dimensional Model of Behavior—a graphic tool used in business management that divides human behaviors into four categories—will help mediators understand different behavioral types in order to select appropriate strategies to advance the mediation.

You are the mediator in a complicated mediation with a history of acrimonious litigation involving multiple parties, their counsel, and representatives and counsel for an insurance carrier and a reinsurer. The parties came to the mediation with widely different monetary demands and offers. The joint mediation session began this morning. You completed your presentation of the mediation process, you described your role as mediator, and you informed the parties of the rules of conduct that you would like them to follow. As you turn to ask one of the plaintiffs for its opening statement, plaintiff's counsel bluntly announces, "I'm not sure why we're here. I have no intention of settling this case for less than a nominal haircut from our original demand. I can try this case and win it 99 out of 100 times. I really have nothing more to say. That's my deal, take or leave it." He sits back in his chair waiting for a reaction. Within seconds, a buzz of whispered conversation generates between defense counsel and their client representatives. Only the lawyer for the reinsurer seems unperturbed and shows no reaction. A couple of defense attorneys start to gather their belongings in preparation of walking out. Suddenly, another defense lawyer admonishes plaintiff's counsel, indicating that nothing will be resolved until outstanding discovery requests are fulfilled. Finally, another attorney, clearly avoiding the conflict, indicates a strong desire to concede to some of the plaintiff's demands.

Has this happened to you? The process has barely started and already there has been a complete breakdown in communication. Plaintiff's counsel began by engaging in very argumentative, assertive and negative behavior, triggering equally negative behavior in defense counsel. The attorneys' verbal and physical actions impaired the mediation, potentially dooming it to failure. As a mediator, how do you react? This article posits that good mediators react like good leaders, using leadership skills to keep the parties focused on dispute resolution.

What does being a good leader entail? In general, it means having an understanding of the stakeholders involved and being able to motivate

Like good leaders, good mediators motivate people to work through difficult problems in order to achieve particular goals.

them to diligently pursue one or more common goals. Leaders make it a priority to obtain and assess information needed to achieve a group's goals, such as higher production or sales levels. This involves identifying the interests and needs of the group, determining whether the group has sufficient resources, and anticipating possible barriers to achievement of the group's goals. Good leaders motivate and encourage stakeholders to explore potential solutions to achieve these goals.

The similarity between a good leader and a good mediator is striking. Mediators are tasked with helping parties with disparate views work together to find an acceptable, confidential, non-litigated solution to their dispute.¹

This article suggests that one proven leadership tool, the Q4 Dimensional Model of Behavior, developed by Drs. Robert Lefton and Victor Buzzota, can help mediators motivate mediation participants to remain committed to resolving their dispute and at the same time improve their own leadership skills. The Q4 model, which categorizes different types of communication behaviors, was designed to enhance leadership communication among employers, employees and peers, and thereby increase harmonious and efficient business decision making and management.² It can also be easily applied to mediation.

The Q4 Dimensional Model is depicted by two charts (Figures A and B). Figure A posits that individual behaviors fall into one of four quadrants, defined by two axes. The X-axis represents a spectrum of behavior, with hostile, unresponsive and disengaging behavior on one side, and warm, responsive and engaging behavior on the other. The Y-axis represents another spectrum,

tion. Creative participation in mediation and working “outside the box” is difficult for them. They worry about making a mistake. As an example, insurance adjusters who are unsure of their authority, display this behavior. They fear making a wrong decision or one that may have an impact on their continued employment.

Q3 behaviors include being social and friendly, good-natured, and quick to compromise and appease. The negotiator who simply wants to avoid confrontation and negativity is using Q3 behavior. While this behavior initially seems conducive to dispute resolution, it often falters through an inability to commit because people who exhibit Q3 behavior can also be disorganized and indecisive.

People exhibiting Q4 behaviors are the most rewarding with whom to work. They are confident and open-minded, inquiring and responsive, interested in the views of others and willing to collaborate in order to reach common goals. They make good leaders, good mediators and good

The Q4 Dimensional Model can help mediators to recognize numerous changing behaviors they will encounter in mediation.

with dominant and direct behavior on one side and indirect, passive behavior on the other.

The quadrants are:

Q1: Dominant, hostile, unresponsive behavior;

Q2: Submissive, withdrawn, unresponsive behavior;

Q3: Submissive, warm and engaged, but responsive behavior; and

Q4: Dominant, warm and engaged, but responsive behavior.

Figure B elaborates on the concepts of direct/indirect, active/proactive, and responsive/nonresponsive behavior.

Q1 behaviors are exemplified by being demanding, forcing ideas, and failing to listen or consider other positions. People who exhibit Q1 behavior appear angry and unreceptive to solutions, having no problem interrupting while others are speaking. They rarely give credit to others, highly valuing their status and adamant that they understand the only path to settlement.

People who exhibit Q2 behaviors tend to be aloof, non-committal, guarded and pessimistic. They procrastinate, often appearing insecure, indecisive and lacking in self-confidence. In negotiations, they have little or nothing to say and seem unreceptive to the prospect of media-

tion. Although they are willing to consider the weaknesses and strengths of their case and participate in the process of identifying needs and interests and devising and considering possible solutions to the dispute, they will not compromise quickly in order to appease other parties.

Keep in mind that the descriptions in the Q4 model are generalizations. In reality, behavior varies as negotiators and mediators communicate in different ways at varying points in the mediation. Their communication behavior may shift from one quadrant of the Q4 Model to another. Therefore, self-monitoring by the mediator is needed to guard against frustration and anger when the mediation is not going smoothly. Mediators need to continually work toward Q4 behavior as they manage the resolution of the dispute.

Using the Q4 Dimension in Mediation

The Q4 Dimensional Model can be used to train mediators to recognize the numerous changing behaviors they will encounter in mediation. As certain behaviors are identified, mediators choose and implement a strategy for dealing with the exhibited behavior that will keep all parties on track toward resolution. Mediator strate-

gies center around the use of “probes” in order to elicit, confirm, clarify or obtain information. Probes may include:

- *Asking Open-Ended Questions:* The mediator asks open-ended questions that pleasantly but firmly acknowledge the party’s comments, while expanding the inquiry to obtain more information or clarification. These questions should not direct the party to a specific conclusion. That is why leading questions and other types of manipulative probes should be avoided. They are highly ineffective methods of behavior management. People who exhibit Q1 and Q2 behaviors will not be pinned down by leading questions and can

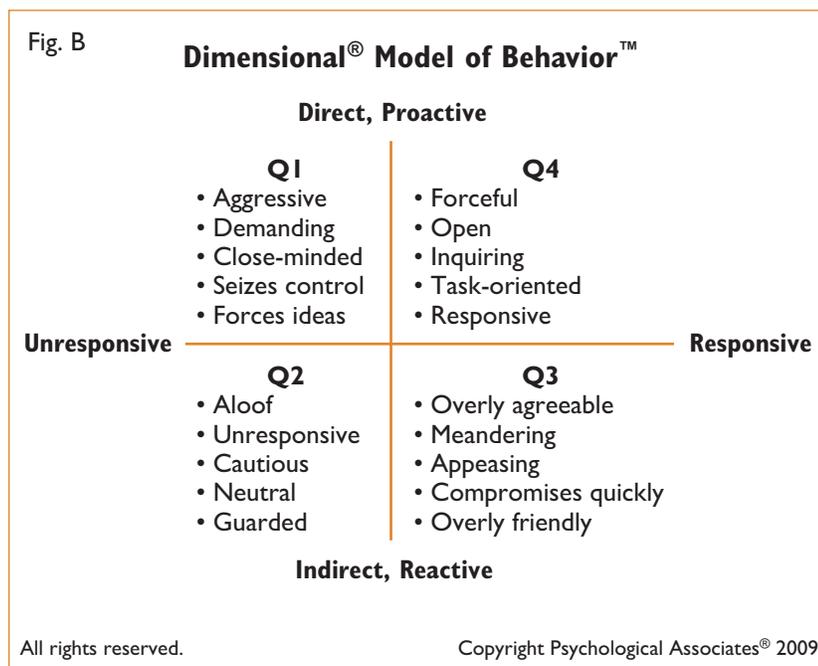
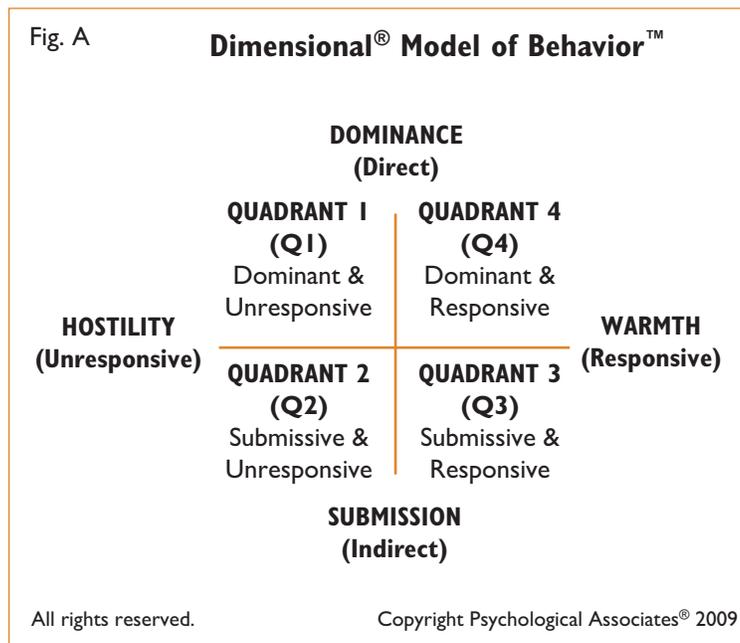
resent manipulative probes, such as, “You do want to resolve this, don’t you?”

- *Reframing a Party’s Statement:* The mediator summarizes what he or she believes a party has said (such as in a response to an open-ended question) and then asks whether this is indeed what the party meant. This combination of summarizing and questioning can delineate areas of agreement and identify disputed issues. Reframing can be very useful because a party is likely to be more receptive to listening to the elements of its position.

- *Using the Pause:* This technique is often used when a party or counsel engages in overt Q1 behavior. Instead of responding verbally, the mediator says nothing, while maintaining a pleasant or neutral demeanor. There are few actions as effective and disarming as a pause, particularly when used in response to ranting, emotional behavior, or when a party tries to seize control of the process or vehemently force its position on others.

- *Using Neutral Statements and Questions:* The mediator makes encouraging statements, for example, “Go on ... tell me more,” to motivate disclosure of information, and asks neutral questions to probe a party’s underlying theory of settlement. An example is, “Will you help me understand how you arrive at that conclusion ...?” Neutral statements and questions encourage participation in the process without being condescending or judgmental regarding a party’s position in the resolution discussion.

- *Making Reflective Statements:* Reflective statements express empathy. For example, saying, “I can understand how you see the issues ...” acknowledges a party’s feelings and encourages the venting of interfering emotions that, if not expressed, could derail the progress of the mediation. The mediator can then move the discussion to the issues that need to be resolved.



We can now apply the Q4 model to the participants in the hypothetical at the beginning of this article. Plaintiff's counsel unquestionably displayed Q1 behavior by issuing an ultimatum, indicating that he was unreceptive to negotiation. His use of an ultimatum when asked to present an opening statement was direct, dominant, proactive, and aggressive behavior. Using the language of Figure B, this attorney "seized control" of the proceedings and made clear that for him, settlement could only take place on his terms.

What about the defense counsel who began packing their bags to leave? We can presume from their behavior that they were angered and insulted by the ultimatum as well as the unresolved discovery dispute. Their behaviors can be characterized as Q1 when they acted out the acrimony of the litigation and as Q2 when they silently held in their anger as they prepared to leave.

What kind of behavior did the unengaged reinsurer's counsel display? His lack of interest in how the proceeding turns out suggests unresponsive Q2 behavior. This is not an uncommon posture for reinsurers, as the issue of their liability is often not at issue until later in the case. Then there is the attorney who is already offering concessions to return to the table. His willingness to please is classic Q3 behavior.

Finally there is the mediator's conduct to consider. His first priority in the hypothetical is to control his own reactions. Since Q1 behavior often triggers Q1 or Q2 behavior in others, the mediator must not succumb to Q1 behavior by allowing his anger or frustration to rise. Doing so would just fuel the fire and defeat the purpose of advancing the mediation.

Mediators faced with Q1 behaviors must remain flexible and confident, manage resistance to the collaborative mediation process and subtly create receptivity. This requires enormous patience. A technique a mediator can use to move the Q1 negotiator away from a hard line position is to seek information and clarification by asking a series of open-ended questions. After receiving a response, the mediator can use the reframing technique to summarize the Q1's position and then continue to ask open-ended questions to seek additional information in areas of continued misunderstanding or disagreement. Frequent pauses are also helpful, particularly when a Q1 party tries to control the communication or vehem-

There are few actions as effective and disarming as a pause.

mentally assert a position.

Dealing with Q2 behavior is difficult and time consuming. Our hypothetical Q2 negotiators are likely to be less receptive to settlement discussions even after they decide not to leave. Their communication is apt to become intensely negative or they may choose not to communicate at all, shifting between Q1 and Q2 behavior. As always, it is important for the mediator to continue to probe for

common areas of concern and interest. The mediator can make reflective statements to encourage venting of interfering emotions, which can make it possible for these negotiators to resume their participation in the process. The mediator can also use the pause technique if the Q2 party begins to engage in pompous Q1 behavior. When confronting Q2 behavior, the mediator needs to remain communicative.

The party exhibiting Q3 behavior in the hypothetical may seem easier to deal with because he is friendly and outwardly expressing a desire to settle. Because Q3 behavior often masks uncertainty and fear about the terms of a possible settlement, mediators usually need to spend a considerable amount of time making sure that a party exhibiting this behavior has the authority to settle or the ability to obtain that authority as settlement discussions progress. The mediator may use leading questions to make sure that the party's failure to provide concrete solutions does not undermine the resolution of the litigation.

Conclusion

The parties may not reach a negotiated settlement every time, but by using the Q4 Dimensional Model, mediators will learn to recognize different communication behaviors and understand how they change during mediation. This will prepare them to quickly and appropriately respond to communications that have an adverse impact on the process, with techniques that encourage genuine receptivity to mediation. Mediators who desire to improve their leadership skills will find the Q4 Model to be an enormous asset. ■

ENDNOTES

¹ For example, Rule 10.220 of the Florida Supreme Court Rules identifies mediator responsibilities to include reducing obstacles to communication, assisting parties in identifying issues in dispute, exploring alternatives for resolution, and facilitating a voluntary settlement on agreed terms.

² The Q4 Dimensional Model is aptly described in R.E. Lefton, & V.R. Buzzota, *Leadership Through People Skills* (McGraw Hill 2004).

A GUIDE TO
Mediation and Arbitration
for Business People

Amended and Effective September 1, 2007



American Arbitration Association
Dispute Resolution Services Worldwide

www.adr.org

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A Guide to Mediation and Arbitration for Business People

Introduction

In the normal course of day-to-day business affairs, disputes are often inevitable. Parties might disagree as to their individual rights and obligations no matter how carefully a contract is written. This can lead to delayed shipments, complaints about the quality of merchandise, claims of nonperformance, and similar misunderstandings. The resolution of such disputes, however, need not be costly and acrimonious. Alternative means of dispute resolution can save time and money, and can help to put the dispute behind you while preserving valuable business relationships.

The American Arbitration Association (AAA) administers a broad range of dispute resolution services, which address the needs of businesses and individuals mired in conflict. These services include:

Mediation

Mediation is a meeting among disputants, their representatives, and a mediator to discuss settlement. The mediator's role is to help the disputants explore issues, needs, and settlement options. The mediator may offer suggestions and point out issues that the disputants may have overlooked, but resolution of the dispute rests with the disputants themselves. A mediation conference can be scheduled very quickly and requires a relatively small amount of preparation time. The conference usually begins with a joint discussion of the case, followed by the mediator working with the disputants both together and separately, if appropriate, to resolve the case. Many cases are resolved within a few hours. Perhaps most important is, mediation works! Statistics show that 85% of commercial matters and 95% of personal injury matters end in written settlement agreements.

Arbitration

Arbitration is referral of a dispute to one or more impartial persons for final and binding determination. Private and confidential, it is designed for quick, practical, and economical settlements. Parties can exercise additional control over the arbitration process by adding specific provisions to their contracts' arbitration clauses or, when a dispute arises, through the modification of certain aspects of the arbitration rules to suit a particular dispute. Stipulations may be made regarding confidentiality of proprietary information used; evidence, locale, number of arbitrators; and issues subject to arbitration, for example. The parties may also provide for expedited arbitration procedures, including the time limit for rendering an award, if they anticipate a need for hearings to be scheduled on short notice. All such mutual agreements will be binding on the American Arbitration Association as well as the arbitrator. The AAA has also developed special Procedures for Large, Complex Disputes for cases in which the disclosed claim of any party is at least \$500,000.

Prior to the initial hearing in a case, the AAA may schedule either an administrative conference with the parties or a preliminary hearing with the arbitrator(s) and the parties to arrange for such matters as the production of relevant documents and the identification of witnesses, and for discussion of and agreement by the parties to any desired rule modifications. AAA administration is guided by those decisions that the parties make as to how to handle such sensitive issues as privacy of proceedings, confidentiality, trade secrets, evidence, proprietary information, and injunctive relief.

The National Roster of Neutrals

To serve the community with mediators and arbitrators representing all fields of specialization, the AAA maintains a national roster of approximately 8,000 trained experts throughout the United States and the rest of the world.

The AAA requires that applicants have a minimum of ten years of senior level business or professional expertise or legal practice prior to being considered for the roster.

Selected qualities in arbitrators and mediators for which the AAA looks are:

- > commitment to impartiality and objectivity;
- > dispute management skills;
- > judicious temperament: impartiality, patience, and courtesy;
- > respect of bar or business community for integrity, patience, and courtesy; and
- > strong academic background and professional or business credentials.

The American Arbitration Association is committed to maintaining an ongoing review of the quality of its roster of neutrals. Current panelists and new applicants are evaluated by regional office committees to guarantee neutrals' possession of superior management skills, commitment, ethics, training, and suitability to the caseload. Then, external review committees evaluate the neutrals according to a number of criteria including substantive expertise, preeminence in the field, fairness, and the manner in which they conduct proceedings. A final internal review by the Association monitors the integrity of the process, the quality of roster composition, and balance in terms of gender, racial, and ethnic diversity. The bottom line is a roster of neutrals crafted to meet the needs of the parties.

An AAA Glossary of Dispute Resolution Terms

Some of the commonly used terms follow.

Arbitration is submission of a dispute to one or more impartial persons for a final and binding decision.

Awards are the decisions of arbitrators. Awards are made in writing and are enforceable in court under state and federal statutes. Enforcement actions, when necessary, are brought by the parties to the arbitration.

Case managers are the AAA staff persons assigned to administer cases. The case manager is responsible for the general management of a particular case, including panel selection, scheduling and exchange of information among the parties, and all of the other administrative details involved in moving cases through the system.

Caucuses are meetings in which a mediator talks with the parties individually to discuss the issues.

Claimants are filing parties, also known as plaintiffs.

Counterclaims are counter demands made by a respondent in his or her favor against a claimant. They are not mere answers or denials of the claimant's allegations.

Demands for Arbitration are unilateral filings of claims in arbitration, based on a contractual or statutory right; also, the forms used.

Fact finding is a process by which parties present the arguments and evidence to a neutral person who then issues a nonbinding report on the findings, usually recommending a basis for settlement.

Hearing is a proceeding in which evidence is taken for the purpose of determining the facts of a dispute and reaching a decision based on evidence.

Mediation is a process in which a neutral assists the parties in reaching their own settlement but does not have the authority to make a binding decision.

Mini-trial is a confidential, nonbinding exchange of information, intended to facilitate settlement. The goal of mini-trial is to encourage prompt, cost-effective resolution of complex litigation. Mini-trial seeks to narrow the areas of controversy, dispose of collateral issues, and encourage a fair and equitable settlement.

Negotiation is a process in which disputants communicate their differences to one another and with this knowledge try to resolve them.

Parties are the disputants.

Respondents are responding parties, also known as defendants.

Submission is the filing of a dispute by all parties to a dispute resolution process after it arises.

A Guide to Mediation for Business People

How Does Mediation Differ From Arbitration?

Arbitration is less formal than litigation, and mediation is even less formal than arbitration. Unlike an arbitrator, a mediator does not have the power to render a binding decision. A mediator does not hold evidentiary hearings as would an arbitrator but instead conducts informal joint and separate meetings with the parties to understand the issues, facts, and positions of the parties. The separate meetings are known as caucuses. In contrast, arbitrators hear testimony and receive evidence in a joint hearing, on which they render a final and binding decision known as an award.

In joint sessions or caucuses with each side, a mediator tries to obtain a candid discussion of the issues and priorities of each party. Gaining certain knowledge or facts from these meetings, a mediator can selectively use the information derived from each side to:

- > reduce the hostility between the parties and help them to engage in a meaningful dialogue on the issues at hand;
- > open discussions into areas not previously considered or inadequately developed;
- > communicate positions or proposals in understandable or more palatable terms;
- > probe and uncover additional facts and the real interests of parties;
- > help each party to better understand the other party's view and evaluation of a particular issue, without violating confidences;
- > narrow the issues and each party's positions, and deflate extreme demands;
- > gauge the receptiveness for a proposal or suggestion;
- > explore alternatives and search for solutions;
- > identify what is important and what is expendable;
- > prevent regression or raising of surprise issues; and
- > structure a settlement to resolve current problems and future parties' needs.

Types of Disputes Resolved by Mediation

Any type of civil dispute can be resolved by mediation. The kinds of conflicts brought to AAA mediations have been as varied as the types of industries and business specialties using the process. Just about any type of dispute that parties want resolved quickly and inexpensively can be submitted to mediation.

The Benefits of Mediation

The benefits of successfully mediating a dispute to settlement vary, depending on the needs and interests of the parties. The most common advantages are that:

- > parties are directly engaged in the negotiation of the settlement;
- > the mediator, as a neutral third party, can view the dispute objectively and can assist the parties in exploring alternatives which they might not have considered on their own;
- > as mediation can be scheduled at an early stage in the dispute, a settlement can be reached much more quickly than in litigation;
- > parties generally save money through reduced legal costs and less staff time;
- > parties enhance the likelihood of continuing their business relationship; and
- > creative solutions or accommodations to special needs of the parties can become a part of the settlement.

In the interest of swift and low-cost dispute resolution, arbitrations pending under the rules of the American Arbitration Association can be submitted to mediation under the applicable mediation rules at no additional administrative fee. The parties are responsible for compensating the mediator at his or her published hourly rate.

Occurrence of Mediation

Mediations can originate in different ways. First, mediation can occur when a dispute initially arises and before a lawsuit is ever filed. Second, mediation can occur as an adjunct procedure to pending litigation. That is, as soon as the parties file a lawsuit, they can use mediation in an effort to resolve the dispute at the inception of litigation or at any time thereafter, but prior to a trial being held. Third, mediation can occur during or immediately after a trial but before a decision is announced by a judge or jury. Fourth, mediation can occur after a judgment has been rendered in litigation. There might be a disagreement over the meaning or manner of carrying out a judgment, or concern about the possibility of lengthy court appeals. The parties can seek the assistance of a mediator to help them resolve these problems.

The Mediators

AAA mediators are carefully selected attorneys, retired judges, and experts in various professional and business fields. Each candidate has been trained by the AAA in mediation skills and closely evaluated to determine the level of skills attained. Only highly respected and experienced individuals are selected and trained by the AAA to be mediators. The mediators on the panel are chosen to serve on a particular case based on their expertise in the area of the dispute.

Scheduling a Mediation

Once parties have agreed to submit their dispute to mediation and have executed the appropriate forms, a mediation can be conducted on the first mutually available date. Of course, the parties may agree to have their mediation set for an earlier or later date depending on the circumstances of their case.

Stages of a Mediation

I. The Agreement to Mediate

As mediation is a voluntary process, the parties must agree in writing that their dispute will be conducted under the applicable mediation rules of the AAA. This may be accomplished in a number of ways.

Request for Mediation

The parties can provide for the resolution of future disputes by including a mediation clause in their contract. A typical mediation clause reads as follows:

If a dispute arises out of or relates to this contract or the breach thereof and if the dispute cannot be settled through negotiation, the parties agree first to try in good faith to settle the dispute by mediation administered by the American Arbitration Association under its Commercial Mediation Procedures before resorting to arbitration, litigation, or some other dispute resolution procedure.

The clause may also provide for the qualifications of the mediator, the method of payment, the locale of meetings, and any other item of concern to the parties. When a party files a Request for Mediation, the requesting party must forward a copy of the mediation clause contained in the contract under which the dispute arose. A Request for Mediation form can be found on the Association's Web site at www.adr.org.

Submission to Mediation

Where the parties did not provide in advance for mediation, they may submit an existing dispute to mediation by the filing of a submission form that has been duly executed by the parties or their authorized representatives. A Submission to Dispute Resolution form can be found on the Association's Web site at www.adr.org.

II. Selection of the Mediator

Upon receipt of the Request for Mediation or the Submission to Dispute Resolution, the AAA will appoint a qualified mediator to serve on the case. The parties will be provided with a biographical sketch of the mediator. The parties are instructed to review the sketch closely and advise the Association of any objections they may have to the appointment. Since it is essential that the parties have complete confidence in the mediator's ability to be fair and impartial, the Association will replace any mediator not acceptable to the parties. Parties also may search the online profiles of the AAA's Panel of Mediators at **www.aaamediation.com**.

III. Preparation for the Mediation Session

To prepare for mediation:

1. Define and analyze the issues involved in the dispute.
2. Recognize the parameters of the given situation (what you can realistically expect, time constraints, available resources, legal ramifications, business or trade practices, costs, etc.).
3. Identify your needs and interests in settling the dispute.
4. Prioritize the issues in light of your needs.
5. Determine courses of action, positions, and tradeoffs and explore a variety of possible solutions.
6. Seek to make your proposals reasonable and legitimate and be willing to accommodate needs of the other party.
7. Ascertain the strengths and weaknesses of your case.
8. Ready facts, documents, and sound reasoning to support your claims.
9. Anticipate the other party's needs, demands, strengths and weaknesses, positions, and version of facts.
10. Focus on the interests, not the position, of each party.
11. Develop your strategies and tactics through discussion of issues, presentation of proposals and testing of the other party's positions.

IV. The Mediation Conference

The parties should come to the mediation conference prepared with all of the evidence and documentation they feel will be necessary to discuss their respective cases. Parties are, of course, entitled to representation by counsel.

At the outset, mediators describe the procedures and ground rules covering each party's opportunity to talk, order of presentation, decorum, discussion of unresolved issues, use of caucuses, and confidentiality of proceedings.

After these preliminaries, each party describes respective views of the dispute. The initiating party discusses its understanding of the issues, the facts surrounding the dispute, what it wants, and why. The other party then responds and makes similar presentations to the mediator. In this initial session, the mediator gathers as many facts as possible and clarifies discrepancies. The mediator tries to understand the perceptions of each party, their interests, and their positions on the issues.

When joint discussions have reached a stage where no further progress is being made, the mediator often meets with each party in caucuses. While holding separate sessions with each party, the mediator may shuttle back and forth between parties and bring them back to joint sessions at appropriate intervals. During each caucus, the mediator attempts to clarify each party's version of the facts, priorities, and positions, loosen rigid stances, explore alternative solutions, and seek possible tradeoffs. The mediator probes, tests, and challenges the validity of each party's positions. The mediator serves not as an advocate but as an "agent of reality." The mediator must make each party think through demands, priorities, and views, and deal with the other party's arguments.

An effective mediator knows that demands and priorities shift as ideas meet opposition, different facts are considered, and underlying circumstances change as parties reappraise and modify positions. In effect, the mediator increases the parties' perceptions of their cases

in order to construct a settlement range within which the parties can assess the consequences of continuing or resolving the dispute. By having parties focus on the risks and burdens of litigation, the mediator creates in the minds of the parties the idea that there are alternatives to seek. The parties articulate these possibilities by moving toward tradeoffs and acceptable accommodations.

During the final caucuses and joint sessions, the mediator narrows the differences between the parties and obtains agreement on major and minor issues. The mediator reduces a disagreement into a workable solution. At appropriate times, the mediator makes suggestions about a final settlement, stresses the consequences of failure to reach agreement, emphasizes the progress which has been made, and formalizes offers to gain an agreement.

The mediator acts as a facilitator to keep discussions focused and avoid new outbreaks of disagreement. The mediator will often have the parties negotiate the final terms of a settlement in a joint session. The mediator will then verify the specifics of an agreement and make sure that the terms are comprehensive, specific, and clear in the final session.

V. The Settlement

When the parties reach an agreement, they should reduce the terms to writing and exchange releases. They may also request that the agreement be put in the form of a consent award, for which the AAA will make the arrangements.

If the mediation fails to reach a settlement of any or all of the issues, the parties may submit to binding arbitration. Such arbitration would be administered under the appropriate arbitration rules. In accordance with the AAA's Commercial Mediation Procedures, the information offered in mediation may not be used in arbitration (or in subsequent litigation).

Cost of the Mediation

The cost of mediation is based on the mediator's published hourly rate, which covers both mediator compensation and an allocated portion for the AAA's services.

All expenses are generally borne equally by the parties. The parties may adjust this arrangement by agreement.

Before the commencement of the mediation, the AAA shall estimate anticipated total expenses. Each party shall pay its portion of that amount as per the agreed upon arrangement. When the mediation has terminated, the AAA shall render an accounting and return any unexpended balance to the parties.

A Guide to Arbitration for Business People

Stages of an Arbitration

I. The Agreement to Arbitrate

The most important step in initiating arbitration is the agreement to arbitrate. This agreement can be of one of two kinds: it can take the form of a future-dispute arbitration clause in a contract or, where the parties did not provide in advance for arbitration, it can take the form of a submission of an existing dispute to arbitration.

The parties can provide for the arbitration of future disputes by inserting the following clause into their contracts.

Standard Arbitration Clause

Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

Arbitration of existing disputes may be accomplished by the use of the following:

We, the undersigned parties, hereby agree to submit to arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules the following controversy: (cite briefly). We further agree that the above controversy be submitted to (one) (three) arbitrator(s). We further agree that we will faithfully observe this agreement and the rules, that we will abide by and perform any award rendered by the arbitrator(s), and that a judgment of the court having jurisdiction may be entered on the award.

Regardless of how the agreement to arbitrate was reached, filing of a claim with the AAA along with the appropriate filing fee, and serving the defending party are all that is required to set the machinery for arbitration into motion. Upon receiving the initiating papers together with the filing fee, the AAA assigns the case to one of its staff members, whose official title is case manager and who, from that point onward, is at the disposal of the parties, expediting administration and assisting both sides in all procedural matters until the award is rendered.

Pursuant to the rules, the parties and the AAA may use facsimile transmission, telegrams, or other written forms of electronic communication to give the notices required by the rules.

The American Arbitration Association will supply the form, or a Submission to Dispute Resolution form, free of charge on request but arbitration may also be initiated through ordinary correspondence, provided that all of the essential information is included. These forms can also be obtained through the Association's Web site located at www.adr.org.

Special attention is sometimes required to determine in which state and city hearings are to take place. If the place of arbitration has not been designated in the contract or the Submission to Dispute Resolution, or if the parties have not otherwise notified the AAA of their agreement on locale, the AAA will designate the city in accordance with its rules. Among the factors considered are:

- > locations of the parties;
- > locations of witnesses and documents;
- > the location of sites or the place of materials;
- > relative costs to the parties;
- > the place of performance of the contract;
- > laws applicable to the contract;
- > places of previous court actions, if any;
- > the location of the most appropriate panel of arbitrators; and
- > any other reasonable arguments that might affect the locale determination.

Hearings may be held in any geographical area, not just where the AAA maintains regional offices.

Expedited Procedures, outlined in Sections E1 through E10 of the rules, are applied in any case where no disclosed claim or counterclaim exceeds \$75,000, exclusive of interest and arbitration costs. Those procedures provide for notice of arbitrator appointment and notice of hearing by telephone and for the award of the arbitrator to be rendered no later than 14 days from the date of closing of the hearing.

An Important Note Concerning Consumer-Related Disputes

The AAA applies the Supplementary Procedures for Consumer-Related Disputes to arbitration clauses in agreements between individual consumers and businesses where the business has a standardized, systematic application of arbitration clauses with customers and where the terms and conditions of the purchase of standardized, consumable goods or services are nonnegotiable or primarily nonnegotiable in most or all of its terms, conditions, features, or choices. The product or service must be for personal or household use. The AAA will have the discretion to apply or not to apply the Supplementary Procedures and the parties will be able to bring any disputes concerning the application or non-application to the attention of the arbitrator. Consumers are not prohibited from seeking relief in a small claims court for disputes or claims within the scope of its jurisdiction, even in consumer arbitration cases filed by the business.

For additional information on the AAA and consumer-related disputes, please review the Consumer Due Process Protocol, the Supplementary Procedures for Consumer-Related Disputes, and other material found on our Web site at www.adr.org.

A Checklist for Initiating Arbitration

	By Demand for Arbitration	By Submission to Arbitrator
Original Document	Mail to the respondent.	File with the AAA in duplicate.
Copies Needed by the AAA	Two.	Two.
Copies Retained by the Parties	The demanding party retains one.	Each party retains one.
Signatures Required	An authorized person for the demanding party signs and lists his or her title.	Authorized persons for both parties sign, listing their titles.
Identification of Parties	The respondent should be clearly identified by official name and address.	Official names and addresses of both parties should appear, with signatures and titles.
Contract Clauses	Arbitration clauses should be quoted in full (may be attached separately if more convenient). Include date of the document.	Not applicable.
The Filing Fee	A nonrefundable filing fee must be advanced by the demanding party. The arbitrator later apports the fee.	The fee may be shared equally. The arbitrator later apportions the fee.
The Statement of the Dispute	It should be brief but clear and include the amount claimed, if any, and the relief sought.	Claims and answers should be brief but clear and include the amount claimed, if any, and the relief sought.
Answering Statements	The respondent may mail the answering statement to the claimant and file two copies with the AAA. If a counterclaim is asserted, a filing fee must be paid.	See the preceding.
Composition of the Arbitration Panel	The AAA will determine the number of arbitrators unless composition is stated in the arbitration clause.	The number of arbitrators desired may be stated at the time of filing. If not stated, the AAA will determine the composition of the panel.
Locale of Arbitration	If not provided for in the arbitration clause, the demanding party should indicate its preference.	Locale should be indicated, if possible.

II. Selection of the Arbitrator

To serve the business community with arbitrators representing all fields of specialization, the American Arbitration Association now maintains a National Roster of Neutrals of approximately 8,000 individuals throughout the United States and the rest of the world. Usually nominated by leading figures in their industries, trades, or professions, arbitrators are added to the panel after careful checking of qualifications and reputations.

Arbitrators generally charge a rate consistent with his or her stated rate of compensation, beginning with the first day of hearing. When appointed by the AAA, neutrals serve under its Commercial Arbitration Rules and their conduct is guided by the Code of Ethics for Arbitrators in Commercial Disputes, a copy of which is sent to them upon their appointment to a case. Arbitrators deserve the same respect and courtesy given to all who dedicate themselves to the public good.

Parties can show their appreciation to the arbitrators and at the same time serve their own best interests by presenting their cases in an expeditious and orderly way, thereby facilitating the task of the arbitrator.

Unless the parties have indicated another method, the AAA uses the following simple and effective system for selecting the arbitrator:

1. After the filing of the submission or the answering statement, or upon the expiration of the time within which the answering statement is to be filed, the AAA sends each party a copy of the same specially prepared list of proposed arbitrators to resolve the controversy. In drafting the list, the AAA is guided by the nature of the dispute. Biographical information on each arbitrator accompanies the list.

2. Parties are allowed 15 days to study the list, strike names to which they object, and number the remaining names in the order of preference. *Additional information about the proposed arbitrators is available through the case manager. While the AAA makes every effort to keep its information current, each party is encouraged to do further research on the persons suggested.* If administration is under the Expedited Procedures, the parties are allowed seven days to study the list of five proposed arbitrators, strike two names, and number the remaining names in order of preference.
3. When these lists are returned to the AAA, the case manager compares indicated preferences and makes note of the mutual choices. Where parties are unable to find a mutual choice on a list, the AAA has the power to make the appointment without submitting additional lists, although additional lists may be submitted at the request of both parties.
4. If the parties cannot agree on an arbitrator, the AAA will make an administrative appointment, but in no case will an arbitrator whose name was crossed out by either party be appointed.

Panels with Party-Appointed Arbitrators

Under some arbitration clauses in use, each party to a dispute appoints one arbitrator (who might or might not be a member of the AAA's National Roster of Neutrals) and the two select a third arbitrator from the AAA's panels in accordance with procedures just described in steps 2-4. Unless the parties specifically agree in writing that the party-appointed arbitrators are to be non-neutral, arbitrators appointed by the parties in this manner must meet the impartiality and independence standards set forth within the rules.

In cases in which the party-appointed arbitrators are serving as non-neutrals, to avoid the danger that a compromise award might have to be rendered for the sake of a majority, the parties sometimes provide, and the AAA recommends, that the third arbitrator be permitted to render the award alone when a unanimous award is not possible. This may be done by the parties in their agreement to arbitrate or in a later stipulation.

It is also recommended in cases involving non-neutral party-appointed arbitrators that the neutral arbitrator ascertain from the party-appointed arbitrators the nature and extent of any relationship between the arbitrators and the parties that appointed the arbitrators and whether there will be any direct communication between such arbitrators and the parties that appointed them.

Finally, even in cases in which party-appointed arbitrators are serving as non-neutrals, the AAA recommends that parties agree to not communicate ex parte with their party-appointed arbitrator after the appointment procedures in the rules have been completed.

III. Preparation for the Hearing

The case manager consults all parties and arbitrators to determine a mutually convenient day and time for the hearing. If the parties cannot agree, the arbitrator is empowered to set dates.

Note that, in this as in all other administrative matters, the AAA staff manages details and arrangements. This has a two-fold advantage: it relieves the arbitrator of the burden and eliminates the necessity of direct communication between the parties and the arbitrator except at the hearing. By specifically forbidding communication with the arbitrator, except in the presence of both parties, AAA rules avoid the danger that one side will offer arguments or evidence that the other has no opportunity to rebut. Parties may participate in the Accelerated Exchange Program allowing the parties and arbitrators to exchange documents directly, copying the AAA, if the case meets specific program requirements.

At the request of any party or at the discretion of the AAA, an administrative conference with the AAA and the parties and/or their representatives will be scheduled in appropriate cases to expedite the proceedings. There is no additional administrative fee for this service.

In most cases, a preliminary hearing with the parties and/or their representatives and the arbitrator will be scheduled by the arbitrator to specify the issues to be resolved, to stipulate uncontested facts, and to consider other matters that will expedite the arbitration proceedings.

Consistent with the expedited nature of arbitration, the arbitrator may, at the preliminary hearing, establish (i) the extent of and a schedule for the production of relevant documents and other information, (ii) the identification of all witnesses to be called, and (iii) a schedule for further hearings to resolve the dispute. For purposes of arbitrator compensation, the preliminary hearing will be considered the first day of service.

Occasionally, a party needs to postpone a scheduled hearing. When this is necessary, the party seeking postponement should first contact the other party to obtain its consent, as well as alternate hearing dates, before contacting the AAA. If the other party does not consent to the postponement, the AAA should be so advised. The case manager will, in turn, coordinate having the arbitrator decide whether the hearing should be postponed, as the rules provide. In no event should the parties contact the arbitrator directly.

Since the arbitrator will make the award on the basis of the facts and exhibits presented at the hearing, it is essential that the parties or their representatives prepare for arbitration carefully.

1. Assemble all documents and papers that you will need at the hearing. Always make photocopies for the arbitrator and the other party. If documents that are needed are in the possession of the other party, ask that they be brought to the arbitration. Under some state arbitration laws, the arbitrator or another person has authority to subpoena documents and witnesses. A checklist of documents and exhibits will be helpful toward your orderly presentation.
2. If it will be necessary for the arbitrator to visit a building site or warehouse for an on-the-spot investigation, make plans in advance. The arbitrator will have to be accompanied by representatives of both parties, unless they specifically authorize that the investigation be conducted without their presence or unless one party fails to attend after being notified.
3. Interview all of your witnesses. Make certain that each one understands the whole case and particularly the importance of his or her own testimony within it.

4. If there is a possibility that others, not on your regular list of witnesses, might have to appear, alert them to be available on call without delay.
5. Make a written summary of what each witness will prove. This will be useful as a checklist at the hearing and will help you make sure that nothing is overlooked.
6. Study the case from the other side's point of view. Be prepared to answer the opposition's evidence.
7. If a transcript of the hearing is needed, the parties are responsible for making the arrangements and notifying the other parties of such arrangements in advance of the hearing.

The right to representation in arbitration by counsel or another authorized person is guaranteed by the rules of the American Arbitration Association. A party who desires to be represented should notify the other side and file a copy of the notice with the AAA at least three days before the hearing. When arbitration is initiated by a representative or when the respondent replies through a representative, however, such notice is deemed to have been given.

IV. Presentation of the Case

Arbitration hearings are conducted somewhat like court trials, except that arbitrations are less formal. Arbitrators are not required to follow strict rules of evidence. They must hear all of the evidence material to an issue but they may determine for themselves what is relevant. Arbitrators are therefore inclined to accept evidence that might not be allowed by judges.

This does not mean, however, that all evidence will be considered of equal weight.

Direct testimony of witnesses is usually more persuasive than hearsay evidence, and facts will be better established by documents and exhibits than by argument only.

It is customary for the claimant to proceed first with its case, followed by the respondent. This order may be varied, however, when the arbitrator thinks it necessary. In any event, the “burden of proof” is not on one side more than the other; each party must try to convince the arbitrator of the correctness of its position and no hearing is closed until both have had a full opportunity to do so. That is why it is equally the responsibility of the claimant and the respondent to present their cases to the arbitrator in an orderly and logical manner. This includes:

1. An opening statement that clearly but briefly describes the controversy and indicates what is to be proved. Such a statement lays the groundwork and helps the arbitrator understand the relevance of testimony to be presented.
2. A discussion of the remedy sought. This is important because the arbitrator’s power is conferred by the agreement of the parties. Each party should try to show that the relief that it requests is within the arbitrator’s authority to grant.
3. Introduction of witnesses in a systematic order to clarify the nature of the controversy and to identify documents and exhibits. Cross-examination of witnesses is important, but each party should plan to establish its case by its own witnesses.
4. A closing statement that should include a summary of the evidence and arguments and a refutation of points made by the opposition.

Above all, a cooperative attitude is essential for effective arbitration. Overemphasis or exaggeration, concealing of facts, introduction of legal technicalities with the objective of delaying proceedings, or, in general, disregard of ordinary rules of courtesy and decorum can have an adverse effect on arbitrators.

After both sides have had an equal opportunity to present all of their evidence, the arbitrator declares the hearing closed. Under AAA rules, the arbitrator has 30 days from that time within which to render an award, unless the agreement provides otherwise. If the case was administered under the Expedited Procedures in the rules, the arbitrator has 14 days within which to render an award.

The Award

The award is the decision of the arbitrator on the matters submitted to him or her under the arbitration agreement. If the arbitration panel consists of more than one arbitrator, the majority decision, under AAA rules, is binding. The purpose of the award is to dispose of the controversy finally and conclusively. It is made within the limits of the arbitration agreement and its rules on each claim submitted. Arbitrators are not required to write opinions explaining the reasons for their decisions. As a general rule, AAA commercial awards consist of a brief direction to the parties on a single sheet of paper. Written opinions can generate attacks on the award because they identify targets for the losing party. In some cases, both parties will request an opinion or the arbitration agreement provides for one. The AAA then has no objection. Usually, however, the parties look to the arbitrator for a decision, not an explanation.

The power of the arbitrator ends with the making of the award. An award may not be changed by the arbitrator, once it is made, unless the parties agree to restore the power of the arbitrator or unless the law provides otherwise.

When the parties agree to request a clarification or interpretation of a disputed ruling, the agreement must be in writing. Such an agreement is filed with the AAA, which then proceeds to make the necessary arrangements with the arbitrator. In some jurisdictions, the law permits arbitrators to clarify or modify the award upon the request of a party.

The services of the AAA are generally concluded with the transmittal of the award. Although there is voluntary compliance with the majority of awards, judgment on the award can be entered in a court having appropriate jurisdiction if necessary.

Procedure for Oral Hearings

	Who Decides	Who Makes Arrangements	Notice
Time	The arbitrator, at the convenience of the parties.	The case manager, who consults the parties and the arbitrator.	At least ten days, given by the case manager unless parties agree otherwise.
Representation by Counsel	The individual party.	The individual party.	Three days notice to other party unless arbitration was initiated by counsel, in which case notice is deemed to have been given.
Stenographic Records and Interpreters	The requesting party.	The requesting party.	The requesting party notifies the other party in advance of the hearing and may inquire of the other side as to whether it would like to share the cost and get a copy of the record.
Attendance at Hearing	Parties attend and bring witnesses. Arbitrators decide which other interested persons may attend and may require withdrawal of witnesses during the testimony of others.	Parties arrange for attendance of witnesses.	Parties notify their own interested persons.
Affidavits and Documents	The arbitrator decides whether to receive such evidence when it is presented.	Each party arranges to submit its own documents. If they are in the possession of the other party, documents may be requested directly.	Arbitrator will set a deadline for exchange of documents and affidavits.
Subpoenas of Witnesses and Documents	The arbitrator issues subpoenas on showing of need by a party. In New York state, attorneys of record may also issue subpoenas.	The case manager obtains signature of arbitrator for subpoena supplied by party and returns subpoena to party for service.	Subpoenas are served by parties directly on the witness or the custodian of documents.
Inspection or Investigation	The arbitrator may decide on his or her own initiative or at the request of a party, if the arbitrator deems it necessary.	The case manager.	Parties are notified of time and place of inspection so that they can be present.
Closing of Oral Hearings	The arbitrator closes the hearing after both sides complete proofs and witnesses. If briefs, investigations, or more data are required, the hearings are kept open.	The case manager arranges for receipt of post-hearing matters and makes a record of the closing of hearings on instructions from the arbitrator.	The case manager notifies parties of all official closing dates.

Procedures for Large, Complex Disputes

Recognizing that large, complex arbitrations often present unique procedural problems, the AAA, working with attorneys, arbitrators, and industry advisory groups, has developed Procedures for Large, Complex Disputes. The overall purpose of these procedures is to provide for efficient, economical, and speedy resolution of larger disputes. Cases are administered by senior AAA staff. The procedures provide for an early administrative conference with the AAA and a preliminary hearing with the arbitrators, both conducted via telephone conference call. Documentary exchanges and other essential exchanges of information are facilitated, as is preparation of a statement of reasons accompanying the award. The procedures apply when the disclosed claim of any party is at least \$500,000. They are meant to complement the applicable rules that the parties have agreed to use and may be modified by the parties.

Optional Rules for Emergency Measures of Protection

If emergency interim relief is required before the panel has been constituted, parties have needed to resort to the courts rather than seek the requisite relief from the arbitrator. To bridge this deficiency and to more fully implement the parties' intent to arbitrate any future disputes, the AAA has made available Optional Rules for Emergency Measures of Protection.

As the title indicates, these measures are optional. The contracting parties must have agreed to use them either by special agreement or in their arbitration clause. A party seeking such relief prior to the constitution of the panel must notify the AAA and all other parties in writing of the nature of the relief sought, the reasons why such relief is required, and why the party is entitled to such relief on an emergency basis. Within one business day of receipt of the notice, the AAA will appoint a single emergency arbitrator to rule on emergency applications from a special AAA panel of emergency arbitrators designated for that purpose. Of course, the appointment of the emergency arbitrator will be subject to a disclosure and challenge procedure similar to that in the standard commercial rules.

The rules provide an expedited time within which the arbitrator shall establish a schedule for consideration of the application for relief, and shall accordingly review the request. If the arbitrator determines that the party is entitled to the relief, he or she may enter an interim award granting the relief and stating the reasons therefore. Any application to modify an interim award of emergency relief must be based on changed circumstances and may be made to the emergency arbitrator until such time as the panel is constituted. The emergency arbitrator shall have no further power to act after the panel is constituted, unless the parties agree that the emergency arbitrator is named as a member of the panel. The procedures contain a provision on modification of the interim award and apportionment of costs.

International Cases

In order to best serve the parties in any international dispute resolution proceeding, the AAA has created a separate division called the International Centre for Dispute ResolutionSM (ICDR). The ICDR handles all international matters, including the administration of international mediation and arbitration cases. This international administrative system is set apart from the AAA's domestic administrative services. The key distinction is to provide the international business and legal community confidence in having an award that will be internationally recognized and enforceable.

An international case is generally defined as having either the place of arbitration or performance of the agreement outside the United States, or having an arbitration agreement between parties from different countries. ICDR administration is designed for parties that have differing languages, legal systems and cultural backgrounds. The ICDR maintains specialized administrative facilities supervised by multilingual attorneys in New York, a European office in Dublin and a worldwide panel of more than 400 arbitrators and mediators.

The International Dispute Resolution Procedures of the ICDR are the most frequently used rules, which were specifically drafted to meet the expectations of international business. Among the more interesting features of these rules are provisions that support party control of the process and provide for independent and impartial arbitrators, expedited proceedings and reasoned decisions. As one of the world's few arbitral institutions that consistently administers international mediations around the globe, the ICDR provides administration of international mediations under the International Mediation Rules of the ICDR. The ICDR also administers cases under Supplementary Procedures for International Commercial Arbitration, which are applied to international proceedings when parties agree to arbitrate in accordance with one of the various AAA arbitration rules. The Supplementary Procedures are used in conjunction with the applicable rules and will incorporate several of the provisions from the international rules. The ICDR also administers cases, as administering or appointing authority, under UNCITRAL arbitration rules. The thrust of all of these rules and procedures is to provide the parties with an expeditious and economic internationally enforceable award.

Administrative Fees

As a not-for-profit organization, the AAA prescribes an initial filing fee and a case service fee to compensate for the cost of providing administrative services. The initial filing fee is payable in full by a filing party when a claim, counterclaim, or additional claim is filed. A case service fee will be incurred for all cases that proceed to their first hearing. Both of these administrative fees are based on the amount of the claim or counterclaim. In addition, filing fees are subject to a refund schedule and case service fees are generally refundable at the conclusion of the case if no hearings occur.

In an effort to make arbitration costs reasonable to consumers, the AAA has a separate fee schedule for disputes arising from arbitration clauses in agreements between individual consumers and businesses, where the business has a standardized, systematic application of arbitration clauses with customers and where the terms and conditions of the purchase of standardized, consumable goods or services are nonnegotiable or primarily nonnegotiable in most or all of its terms, conditions, features, or choices. The product or service must be for personal or household use. Please refer to the Supplementary Procedures for Consumer-Related Disputes when filing a consumer-related claim.

Arbitrator compensation is not included in the administrative fee schedule. The parties are responsible for compensating the arbitrator at his or her published rate (hourly or per diem).

As an additional service, the AAA provides hearing rooms, which are available for rental by the parties. Check with the AAA for rates and availability.

For more information concerning the AAA's administrative fee schedule and refund schedule, please visit our Web site at www.adr.org.

Notes

Notes

Rules, forms, procedures and guides, as well as information about applying for a fee reduction or deferral, are subject to periodic change and updating. To ensure that you have the most current information, see our Web site at www.adr.org.

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American Arbitration Association

Dispute Resolution Services Worldwide



**MODEL STANDARDS OF CONDUCT
FOR MEDIATORS**

AMERICAN ARBITRATION ASSOCIATION
(ADOPTED SEPTEMBER 8, 2005)

AMERICAN BAR ASSOCIATION
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ASSOCIATION FOR CONFLICT RESOLUTION
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The Model Standards of Conduct for Mediators September 2005

The *Model Standards of Conduct for Mediators* was prepared in 1994 by the American Arbitration Association, the American Bar Association's Section of Dispute Resolution, and the Association for Conflict Resolution¹. A joint committee consisting of representatives from the same successor organizations revised the Model Standards in 2005.² Both the original 1994 version and the 2005 revision have been approved by each participating organization.³

Preamble

Mediation is used to resolve a broad range of conflicts within a variety of settings. These Standards are designed to serve as fundamental ethical guidelines for persons mediating in all practice contexts. They serve three primary goals: to guide the conduct of mediators; to inform the mediating parties; and to promote public confidence in mediation as a process for resolving disputes.

Mediation is a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision making by the parties to the dispute.

Mediation serves various purposes, including providing the opportunity for parties to define and clarify issues, understand different perspectives, identify interests, explore and assess possible solutions, and reach mutually satisfactory agreements, when desired.

Note on Construction

These Standards are to be read and construed in their entirety. There is no priority significance attached to the sequence in which the Standards appear.

The use of the term "shall" in a Standard indicates that the mediator must follow the practice described. The use of the term "should" indicates that the practice described in the standard is highly desirable, but not required, and is to be departed from only for very strong reasons and requires careful use of judgment and discretion.

¹ The Association for Conflict Resolution is a merged organization of the Academy of Family Mediators, the Conflict Resolution Education Network and the Society of Professionals in Dispute Resolution (SPIDR). SPIDR was the third participating organization in the development of the 1994 Standards.

² Reporter's Notes, which are not part of these Standards and therefore have not been specifically approved by any of the organizations, provide commentary regarding these revisions.

³ The 2005 revisions to the Model Standards were approved by the American Bar Association's House of Delegates on August 9, 2005, the Board of the Association for Conflict Resolution on August 22, 2005 and the Executive Committee of the American Arbitration Association on September 8, 2005.

The use of the term “mediator” is understood to be inclusive so that it applies to co-mediator models.

These Standards do not include specific temporal parameters when referencing a mediation, and therefore, do not define the exact beginning or ending of a mediation.

Various aspects of a mediation, including some matters covered by these Standards, may also be affected by applicable law, court rules, regulations, other applicable professional rules, mediation rules to which the parties have agreed and other agreements of the parties. These sources may create conflicts with, and may take precedence over, these Standards. However, a mediator should make every effort to comply with the spirit and intent of these Standards in resolving such conflicts. This effort should include honoring all remaining Standards not in conflict with these other sources.

These Standards, unless and until adopted by a court or other regulatory authority do not have the force of law. Nonetheless, the fact that these Standards have been adopted by the respective sponsoring entities, should alert mediators to the fact that the Standards might be viewed as establishing a standard of care for mediators.

STANDARD I. SELF-DETERMINATION

- A. 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. Parties may exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes.
 - 1. 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 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.
- B. A mediator shall not undermine party self-determination by any party for reasons such as higher settlement rates, egos, increased fees, or outside pressures from court personnel, program administrators, provider organizations, the media or others.

STANDARD II. IMPARTIALITY

- A. A mediator shall decline a mediation if the mediator cannot conduct it in an impartial manner. Impartiality means freedom from favoritism, bias or prejudice.
- B. A mediator shall conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality.
 - 1. A mediator should not act with partiality or prejudice based on any participant's personal characteristics, background, values and beliefs, or performance at a mediation, or any other reason.
 - 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.
 - 3. 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.
- C. If at any time a mediator is unable to conduct a mediation in an impartial manner, the mediator shall withdraw.

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 can arise from involvement by a mediator with the subject matter of the dispute or from any relationship between a mediator and any mediation participant, whether past or present, personal or professional, that reasonably raises a question of a 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. A mediator's actions necessary to accomplish a reasonable inquiry into potential conflicts of interest may vary based on practice context.
- C. A mediator shall disclose, as soon as practicable, 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. After disclosure, if all parties agree, the mediator may proceed with the mediation.
- D. If a mediator learns any fact after accepting a mediation that raises a question with respect to that mediator's service creating a potential or actual conflict of interest, the mediator shall disclose it as quickly as practicable. After disclosure, if all parties agree, the mediator may proceed with the mediation.
 - E. If a mediator's conflict of interest might reasonably be viewed as undermining the integrity of the mediation, a mediator shall withdraw from or decline to proceed with the mediation regardless of the expressed desire or agreement of the parties to the contrary.
 - F. Subsequent to a mediation, a mediator shall not establish another relationship with any of the participants in any matter that would raise questions about the integrity of the mediation. When a mediator develops personal or professional relationships with parties, other individuals or organizations following a mediation in which they were involved, the mediator should consider factors such as time elapsed following the mediation, the nature of the relationships established, and services offered when determining whether the relationships might create a perceived or actual conflict of interest.

STANDARD IV. COMPETENCE

- A. A mediator shall mediate only when the mediator has the necessary competence to satisfy the reasonable expectations of the parties.
 - 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 mediator competence. A person who offers to serve as a mediator creates the expectation that the person is competent to mediate effectively.
 - 2. A mediator should attend educational programs and related activities to maintain and enhance the mediator's knowledge and skills related to mediation.
 - 3. A mediator should have available for the parties' information relevant to the mediator's training, education, experience and approach to conducting a mediation.
- B. If a mediator, during the course of a mediation determines that the mediator cannot conduct the mediation competently, the mediator shall discuss that determination with the parties as soon as is practicable and take appropriate steps

- to address the situation, including, but not limited to, withdrawing or requesting appropriate assistance.
- C. If a mediator's ability to conduct a mediation is impaired by drugs, alcohol, medication or otherwise, the mediator shall not conduct the mediation.

STANDARD V. CONFIDENTIALITY

- A. A mediator shall maintain the confidentiality of all information obtained by the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law.
1. If the parties to a mediation agree that the mediator may disclose information obtained during the mediation, the mediator may do so.
 2. A mediator should not communicate to any non-participant information about how the parties acted in the mediation. A mediator may report, if required, whether parties appeared at a scheduled mediation and whether or not the parties reached a resolution.
 3. If a mediator participates in teaching, research or evaluation of mediation, the mediator should protect the anonymity of the parties and abide by their reasonable expectations regarding confidentiality.
- B. A mediator who meets with any persons in private session during a mediation shall not convey directly or indirectly to any other person, any information that was obtained during that private session without the consent of the disclosing person.
- C. A mediator shall promote understanding among the parties of the extent to which the parties will maintain confidentiality of information they obtain in a mediation.
- D. Depending on the circumstance of a mediation, the parties may have varying expectations regarding confidentiality that a mediator should address. 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.

STANDARD VI. QUALITY OF THE PROCESS

- A. A mediator shall conduct a 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. 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 a mediation.
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 all sessions.
4. A mediator should promote honesty and candor between and among all participants, and a mediator shall not knowingly misrepresent any material fact or circumstance in the course of a mediation.
5. The role of a mediator differs substantially from other professional roles. Mixing the role of a mediator and the role of another profession is problematic and thus, a mediator should distinguish between the roles. A mediator may provide information that the mediator is qualified by training or experience to provide, only if the mediator can do so consistent with these Standards.
6. 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.
7. A mediator may recommend, when appropriate, that parties consider resolving their dispute through arbitration, counseling, neutral evaluation or other processes.
8. A mediator shall not undertake an additional dispute resolution role in the same matter without the consent of the parties. Before providing such service, a mediator shall inform the parties of the implications of the change in process and obtain their consent to the change. A mediator who undertakes such role assumes different duties and responsibilities that may be governed by other standards.
9. If a mediation is being used to further criminal conduct, a mediator should take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.
10. If a party appears to have difficulty comprehending the process, issues, or settlement options, or difficulty participating in a 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.

- B. If a mediator is made aware of domestic abuse or violence among the parties, the mediator shall take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.
- C. If a mediator believes that participant conduct, including that of the mediator, jeopardizes conducting a mediation consistent with these Standards, a mediator shall take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.

STANDARD VII. 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.
 - 1. A mediator should not include any promises as to outcome in communications, including business cards, stationery, or computer-based communications.
 - 2. A mediator should only claim to meet the mediator qualifications of a governmental entity or private organization if that entity or organization has a recognized procedure for qualifying mediators and it grants such status to the mediator.
- B. A mediator shall not solicit in a manner that gives an appearance of partiality for or against a party or otherwise undermines the integrity of the process.
- C. A mediator shall not communicate to others, in promotional materials or through other forms of communication, the names of persons served without their permission.

STANDARD VIII. FEES AND OTHER CHARGES

- A. A mediator shall provide each party or each party's representative true and complete 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, the time required and the rates customary for such mediation services.

2. A mediator's fee arrangement should be in writing unless the parties request otherwise.
- B. A mediator shall not charge fees in a manner that impairs a mediator's impartiality.
1. A mediator should not enter into a fee agreement which is contingent upon the result of the mediation or amount of the settlement.
 2. While a mediator may accept unequal fee payments from the parties, a mediator should not use fee arrangements that adversely impact the mediator's ability to conduct a mediation in an impartial manner.

STANDARD IX. ADVANCEMENT OF MEDIATION PRACTICE

- A. A mediator should act in a manner that advances the practice of mediation. A mediator promotes this Standard by engaging in some or all of the following:
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 newer mediators through training, mentoring and networking.
- B. A mediator should demonstrate respect for differing points of view within the field, seek to learn from other mediators and work together with other mediators to improve the profession and better serve people in conflict.



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