

**OFFICE OF THE EXECUTIVE SECRETARY
OF THE SUPREME COURT OF VIRGINIA**

**STANDARDS OF ETHICS AND PROFESSIONAL
RESPONSIBILITY FOR CERTIFIED MEDIATORS**

**Adopted by the Judicial Council of Virginia April 5, 2011
Effective Date: July 1, 2011**

A. GENERAL

The Commonwealth of Virginia permits the referral of civil disputes pending in court to mediators certified pursuant to Guidelines adopted by the Judicial Council of Virginia. The referral of cases from the court system to mediation places an important responsibility upon persons who serve as mediators. Confidence in the mediation process and in the integrity and competence of mediators depends upon mediators conducting themselves in accordance with the highest ethical standards. These Standards are intended to guide the conduct of mediators certified pursuant to Guidelines adopted by the Judicial Council of Virginia and to promote public and judicial confidence in the mediation process.

This section and the Scope and Definitions provide general orientation. The text of the body of these Standards is authoritative and the Comments accompanying each section are interpretive.

B. SCOPE AND DEFINITIONS

These Standards of Ethics and Professional Responsibility apply to all certified mediators in their capacity 1) as mediators in court-referred and all other mediations in the Commonwealth of Virginia; 2) as trainers of certified mediation courses; and 3) as mediation mentors.

Mediation, as defined in Virginia Code § 8.01-581.21, is “a process in which a mediator facilitates communication between the parties and, without deciding the issues or imposing a solution on the parties, enables them to understand and to reach a mutually agreeable resolution to their dispute.” See also Virginia Code § 8.01-576.4.

Mediator, as defined in Virginia Code § 8.01-581.21, “means an impartial third party selected by agreement of the parties to a controversy to assist them in mediation.” See also Virginia Code § 8.01-576.4.

These Standards recognize the need for flexibility in style and process and are not intended to unduly restrict the practice of mediation.

Comment: It is the intent of the drafters of the Standards that the term “party” means an individual who has an issue to be resolved, and the term “participant” means everyone, other than the mediator, who participates in the process, including the parties.

C. ASSESSING THE APPROPRIATENESS OF THE MEDIATION

Prior to and throughout the mediation, the mediator should assess whether:

1. mediation is an appropriate process for the parties;
2. each party is able to participate effectively in the mediation; and
3. each party is willing to enter and participate in the mediation in good faith.

If in the judgment of the mediator the conditions specified in C.1. through C.3. are not met, the mediator shall not commence or continue the mediation.

Comment: Section 8.01-576.5 of the Code of Virginia allows a court to refer any contested civil matter to a dispute resolution orientation session. "Orientation session" is defined in Section 8.01-576.4 as a preliminary meeting during which the parties and the neutral assess the case and decide whether to continue with a dispute resolution proceeding or adjudication. A major goal of the orientation session is to educate the parties about dispute resolution processes available to them, such as mediation.

The orientation session can also play an important role as an assessment tool. Assessment as to whether a case is appropriate for a dispute resolution process, like mediation, may involve, particularly in family cases, separate screening interviews with the parties. Where appropriate, these interviews should include specific questions regarding violence and abuse (physical, emotional, and verbal abuse and/or threats), child abuse/neglect, drug and/or alcohol use, and balance of power. In cases where separate screening interviews have been conducted by an intake specialist or organization, such as a court program or community mediation center, such screening must meet the requirements of this Section. This in no way relieves the mediator from continual assessment of appropriateness throughout the mediation process. See Section K.4.

D. INITIATING THE PROCESS

1. Description of Mediation Process. The mediator shall define mediation (as defined in Scope and Definitions) and describe the mediation process to the participants.

- a) The description of the process shall include an explanation of the role of the mediator.
- b) The mediator shall also generally describe his or her style and approach to mediation. The parties must be given an opportunity to express their expectations regarding the conduct of the mediation process. The parties and mediator must include in the Agreement to Mediate a general statement regarding the mediator's style and approach to mediation to which the parties have agreed.
- c) The mediator shall describe the stages of the mediation process.

2. Procedures

- a) Prior to commencement of a court-referred mediation, the mediator shall inform the parties in writing of the following:

- 1) The mediator does not provide legal advice.
- 2) Any mediated agreement may affect the legal rights of the parties.
- 3) Each party to the mediation has the opportunity to consult with independent legal counsel at any time and is encouraged to do so.
- 4) Each party to the mediation should have any draft agreement reviewed by independent legal counsel prior to signing the agreement.

b) In all other cases, the mediator shall inform the parties, orally or in writing, of the substance of the following:

- 1) The mediator does not provide legal advice.
- 2) Any mediated agreement may affect the legal rights of the parties.
- 3) Each party to the mediation has the opportunity to consult with independent legal counsel at any time and is encouraged to do so.
- 4) Each party to the mediation should have any draft agreement reviewed by independent legal counsel prior to signing the agreement.

c) The mediator should reach an understanding with the parties regarding the procedures which may be used in mediation. This includes, but is not limited to, the practice of separate meetings (caucus) between the mediator and participants, the involvement of additional interested persons, the procedural effect on any pending court case of participating in the mediation process, and the ability of any party or the mediator to terminate the mediation.

Comment: In section D.1.a., the description of the mediation process may include an explanation of the role of the mediator as that of a facilitator, not advocate, judge, jury, counselor or therapist. The role of the mediator also includes, but is not limited to, assisting the parties in identifying issues, reducing obstacles to communication, maximizing the exploration of alternatives, and helping the parties reach voluntary agreements.

In Section D.1.c., the stages of mediation should include at a minimum, an opportunity for all the parties to be heard, the identification of issues to be resolved in mediation, the generation of alternatives for resolution, and, if the parties so desire, the development of a Memorandum of Understanding or Agreement.

In Section D.2.b., the primary role of the mediator is to facilitate the voluntary resolution of a dispute. In order to ensure that parties make informed decisions, mediators should make the parties aware of the importance of consulting other professionals. Particularly where legal rights are involved or the parties' expectation is to enter into a binding and enforceable agreement, clear notification of the information in (b) 1-4 is essential. A mediator can most effectively verify that he or she has informed the parties of the items listed in (b) 1-4 if these items are put in writing.

E. SELF DETERMINATION

1. Mediation is based on the principle of self-determination by the parties. Self-determination is the act of coming to a voluntary, uncoerced decision.
2. The mediator may provide information and raise issues. The mediator has no vested interest in the outcome of the mediation. Therefore, the mediator must encourage the parties to develop their own solution to the conflict. The mediator may suggest and explore options for the parties to consider, only if the suggestions do not interfere with the mediator's impartiality or the self-determination of the parties. The mediator may not recommend a particular solution to any of the issues in dispute between the parties or coerce the parties to reach an agreement on any or all of the issues being mediated.
3. The primary role of the mediator is to facilitate a voluntary resolution of a dispute. The mediator may not coerce a party into an agreement, and shall not make decisions for any party to the mediation process.
4. The mediator shall promote a balanced process and shall encourage the participants to participate in the mediation in a collaborative, non-adversarial manner.
5. A mediator must obtain consent from the parties before conducting another dispute resolution process, such as arbitration, in the same matter as the one being mediated. Prior to requesting the parties' consent, the mediator shall inform the parties of the following:
 - a) the procedures that will be used in the additional dispute resolution process, and
 - b) the implications of having the same neutral conduct both processes.

A mediator who conducts an additional dispute resolution process, in the same matter as the one being mediated, assumes different duties and responsibilities that may be governed by other professional standards.

F. PROFESSIONAL INFORMATION

1. The mediator shall encourage the parties to obtain independent expert information and/or advice when such information and/or advice is needed to reach an informed agreement or to protect the rights of a party.
2. A mediator may give information only in those areas where qualified by training or experience and only if the mediator can do so consistent with these Standards.
3. When providing information, the mediator shall do so in a manner that does not interfere with the mediator's impartiality or the self-determination of the parties.

Comment: The role of the mediator differs substantially from other professional roles. Mixing the role of a mediator and the role of another professional is problematic and thus, a mediator should distinguish between the roles. For additional information, see Virginia's Guidelines on Mediation and the Unauthorized Practice of Law.

G. IMPARTIALITY

1. A mediator shall conduct a mediation in an impartial manner. Impartiality means freedom from favoritism or bias in word, action, or appearance. If the mediator cannot conduct the mediation in an impartial manner, the mediator shall not serve.
2. A mediator should avoid the appearance of partiality, as viewed by the parties, at all times in providing mediation services. A mediator shall promptly disclose any facts, including any actual or potential conflicts of interest, that are known to the mediator and could reasonably be seen by the parties as creating an appearance of partiality. This is an ongoing duty.
3. The parties may also raise, at any time, any concerns they may have regarding the appearance of partiality by the mediator.
4. After appropriate disclosure and discussion of any matters regarding the appearance of partiality on the part of the mediator, the mediator may proceed with the mediation, if the mediator and all parties agree. Otherwise, the mediator shall not serve.

Comments:

1. A mediator should not act from favoritism or bias based on any participant's personal characteristics, background, values, beliefs, or performance at a mediation, or any other reason.
2. Matters that may create an appearance of partiality include, but are not limited to, (a) a mediator's involvement in, or opinions and beliefs about, the subject matter of the dispute and (b) a mediator's known current, known past, or reasonably anticipated future relationship or affiliation, whether personal or professional, with any participant in the mediation process.
3. 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 impartiality or raises an appearance of partiality as viewed by the parties. However, 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 impartiality or raise an appearance of partiality as viewed by the parties.
4. In making any disclosures under this Standard, the neutral should not reveal any confidential information. Mediators should consider whether written or verbal disclosure is more appropriate, considering the situation requiring disclosure.

H. CONFIDENTIALITY

1. In order to inform the participants about confidentiality in mediation, the mediator shall use an Agreement to Mediate that contains the statutory language relating to confidentiality and any requirements for mandatory reporting that are applicable to the mediation. In such Agreement, the mediator and parties may also agree in writing to create (a) any additional confidentiality provisions that are not inconsistent with law and (b) any additional exceptions to confidentiality. Any such additional exceptions or

confidentiality provisions must be in writing and signed by the participants. The statutory language to be included from Virginia Code § 8.01-581.22 is as follows:

All memoranda, work products and other materials contained in the case files of a mediator or mediation program are confidential. Any communication made in or in connection with the mediation, which relates to the controversy being mediated, including screening, intake, and scheduling a mediation, whether made to the mediator, mediation program staff, to a party, or to any other person, is confidential. However, a written mediated agreement signed by the parties shall not be confidential, unless the parties otherwise agree in writing.

Confidential materials and communications are not subject to disclosure in discovery or in any judicial or administrative proceeding except:

- (i) where all parties to the mediation agree, in writing, to waive the confidentiality,
- (ii) in a subsequent action between the mediator or mediation program and a party to the mediation for damages arising out of the mediation,
- (iii) statements, memoranda, materials and other tangible evidence, otherwise subject to discovery, which were not prepared specifically for use in and actually used in the mediation,
- (iv) where a threat to inflict bodily injury is made,
- (v) where communications are intentionally used to plan, attempt to commit, or commit a crime or conceal an ongoing crime,
- (vi) where an ethics complaint is made against the mediator by a party to the mediation to the extent necessary for the complainant to prove misconduct and the mediator to defend against such complaint,
- (vii) where communications are sought or offered to prove or disprove a claim or complaint of misconduct or malpractice filed against a party's legal representative based on conduct occurring during a mediation,
- (viii) where communications are sought or offered to prove or disprove any of the grounds listed in § 8.01-581.26 in a proceeding to vacate a mediated agreement, or
- (ix) as provided by law or rule.

2. At the commencement of the orientation session and of any mediation, the mediator shall inform the participants of any mandatory reporting obligations of the mediator, such as the reporting of allegations of child abuse (Virginia Code § 63.2-1509).

3. At the commencement of the orientation session and of any mediation, the mediator shall inform the participants of any required reporting to the court in court-referred cases. For example, in reporting on the outcome of the dispute resolution proceeding to the referring court, the mediator shall indicate whether an agreement was reached, the terms of the agreement if authorized by the parties, the fact that no agreement was reached, or the fact that the orientation session or mediation did not occur (Virginia Code § 8.01-576.9).

4. The mediator shall not disclose information exchanged or observations regarding the conduct and demeanor of the parties and their counsel during the dispute resolution proceeding, unless the parties otherwise agree (Virginia Code § 8.01-576.9. See also Virginia Code § 8.01-581.24).

5. The mediator should have a reasonable understanding of confidentiality in mediation.

6. The mediator shall promote understanding among the participants of the extent to which the mediator and the participants will maintain confidentiality.

7. If a mediator participates in teaching, research or evaluation of mediation, the mediator shall protect the anonymity of the participants and abide by their reasonable expectations regarding confidentiality.

8. Unless expressly authorized by the disclosing party, the mediator may not disclose to either party information relating to the subject matter of the mediation provided to him in confidence by the other (Virginia Code § 8.01-581.24.).

I. AGREEMENT

1. Prior to the parties entering into a mediated agreement, the mediator shall encourage the parties to consider the meaning and ramifications of the agreement and the interests of any third parties.

2. The mediator shall encourage review of any agreement by independent legal counsel for each of the parties prior to the mediated agreement being signed by the parties.

3. If the mediator has concerns about the possible consequences of a proposed agreement or that any party does not fully understand the terms of the agreement or its consequences, the mediator may raise these concerns with the parties and may withdraw from the mediation.

J. COMPETENCE

1. If at the time of the referral, a mediator determines that he or she lacks sufficient mediator skill or subject-matter knowledge to effectively mediate the dispute, the mediator shall notify the parties and shall decline to mediate the dispute, unless the parties agree otherwise.

2. If a mediator determines during the course of a mediation that he or she lacks sufficient mediator skill or subject-matter knowledge to effectively mediate the dispute, the mediator shall notify the parties and shall withdraw, unless the parties agree otherwise.

K. QUALITY OF THE PROCESS

1. A mediator shall conduct a mediation in a manner that promotes diligence, timeliness, safety, procedural fairness, and mutual respect among all the participants. A mediator should agree to mediate only when the mediator is prepared to commit the time and attention essential to an effective mediation.

2. A mediator shall act consistently with all Virginia statutes governing mediation, mediators, and dispute resolution proceedings.

3. A mediator should promote honesty and candor between and among all participants.
4. The mediator shall terminate the mediation when, in the mediator's judgment, the integrity of the process has been compromised. (For example, by inability or unwillingness of a party to participate effectively; gross inequality of bargaining power or ability; and unfairness resulting from nondisclosure, where there is a legal duty to disclose, or fraud, by a participant.) The mediator may explain the reason for the mediator's termination, so long as the explanation is consistent with the obligations arising under these Standards, including but not limited to the obligation of confidentiality.
5. Mediators shall conduct themselves in a manner that will instill confidence in the mediation process and in the integrity and competence of mediators. Mediators shall conduct mediations consistent with the proper administration of justice. For example, a mediator shall not:
 - a) commit a criminal or deliberately wrongful act that reflects adversely on the mediator's honesty, trustworthiness or fitness to provide mediation services, conduct mediation training programs, and/or mentor; or
 - b) engage in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the mediator's fitness to provide mediation services, to conduct mediation training programs, and/or to mentor; or
 - c) knowingly assist or induce another person to violate or attempt to violate the Standards of Ethics and Professional Responsibility for Certified Mediators.

L. FEES

1. A mediator shall fully disclose compensation, fees, and, charges to the parties.
2. A mediator shall not enter into a fee agreement contingent on the result of the mediation or the amount of settlement because such a practice creates an appearance of partiality.
3. A mediator shall not give or receive any commission or other monetary or non-monetary form of consideration in return for referral of parties for mediation services.

Comment: Section L.3. is not intended to preclude a dispute resolution organization or program from receiving a commission or consideration for acceptance of a case which it then refers to a member of the organization's panel of neutrals.

M. ADVERTISING

A mediator shall be truthful in advertising, solicitation, information distributed electronically through a website, or other communication about the mediator's qualifications, experience, services and fees.

N. COMMUNITY SERVICE

A mediator is encouraged to provide pro bono or reduced fee services to the community, where appropriate.

O. ADDITIONAL RESPONSIBILITIES

These Standards are not intended to be exclusive and do not in any way limit the responsibilities the mediator may have under codes of ethics or professional responsibility promulgated by any other profession to which the mediator belongs or any other code of ethics or professional responsibility to which the mediator subscribes, such as those promulgated by the American Bar Association, the Association for Conflict Resolution or the American Arbitration Association. However, where these Standards and another code of ethics or professional responsibility conflict, these Standards take precedence.

P. ENFORCEMENT OF THE STANDARDS OF ETHICS AND PROFESSIONAL RESPONSIBILITY

The Standards of Ethics and Professional Responsibility for Certified Mediators shall be enforced through the processes set out in the Procedures for Complaints Against Certified Mediators, Mediation Trainers, and Mediator Mentors available on the Supreme Court of Virginia web site (www.courts.state.va.us).