CHAPTER 4 - ETHICAL STANDARDS

SUMMARY OF ETHICAL STANDARDS

Introduction. There are eight (8) Ethical Standards for neutrals providing court-connected dispute resolution services. They are intended to promote high quality service and public confidence. They apply to all neutrals providing dispute resolution services for the Trial Court and the appellate courts, including state and other public employees. The full text of the Ethical Standards appears as Rule 9 of the Supreme Judicial Court Rules on Dispute Resolution.

1. Impartiality.

- Impartiality means freedom from favoritism or bias in conduct and appearance.
- A neutral must provide dispute resolution services only in disputes in which she or he can be impartial with respect to the parties and the subject matter.
- If the neutral is unable to be impartial, she or he must withdraw even if the parties express no objection to the neutral's provision of services.
- A neutral must not solicit or accept any gifts or compensation other than the court-established dispute resolution fee.

2. Informed Consent.

- A neutral must make every reasonable effort to ensure that each party understands and consents to the dispute resolution process (including such characteristics as private conversations with the neutral); and any agreement reached.
- If the neutral believes that a party is unable to understand or participate effectively in the process, the neutral must either limit the scope of the process or terminate it. In taking these actions, the neutral should safeguard the confidentiality and interests of the person in need of assistance and maintain impartiality.
- A neutral should inform an unrepresented party if the neutral believes that the party needs expert information or advice in order to protect the party's rights or reach an informed agreement.
- A neutral may provide information to the parties but must not provide legal advice, counseling or other professional services in connection with the dispute resolution process.
- The neutral must inform the parties of their right to redraw from the process at any time and for any reason, except as provided by law or court order.
- In dispute resolution processes which depend upon the agreement of the parties, the neutral must not coerce the parties to reach agreement.

3. Fees.

- A neutral must inform each party, before the process begins, of any fees that will be charged, to whom the fee will be paid, and whether the parties may apply for a fee-waiver or reduction of fees.

- A neutral must enter into a written agreement with the parties, before the process begins, stating any fees and the time and manner of payment.

- Fee agreements may not be contingent upon the result of the dispute resolution process or the amount of the settlement.

- A neutral must not accept, provide or promise a fee for giving or receiving a referral of any matter.

- A neutral must not solicit or accept any payment above the court-established fee when providing court-connected dispute resolution services.

4. Conflict of Interest.

- A neutral must disclose to all parties all actual or potential conflicts of interests, including circumstances that could give rise to an appearance of conflict.

- A neutral must not serve as a neutral in a process after he or she knows of a conflict, unless the parties, after being informed, consent to the neutral's service and the neutral determines that the conflict is not so significant as to cast doubt on the integrity of the dispute resolution process and/or the neutral.

- Examples of Conflict:
  - Current or past personal or professional relationship with a party or a party's attorney;
  - Any financial interest in the subject matter of the dispute or financial relationship with the parties, their attorneys or an immediate family member of a party or attorney;
  - Any circumstances that could create an appearance of conflict of interests.

- If a conflict is so significant as to cast doubt on the integrity of the process or the neutral, the neutral must withdraw even if the parties express no objection.

- If a neutral is not significant, the neutral must ask the parties whether they wish for the neutral to proceed, and the neutral may proceed only upon the consent of all parties.

- A neutral must avoid even the appearance of a conflict of interest both during and after the provision of services.

- A neutral must not solicit future service arrangements with a party.

- A neutral may not act on behalf of a party or represent one party against another in any matter related to the subject of the dispute resolution process for a period of one year, unless the parties all consent to such action or representation.

- A neutral should avoid conflicts of interest in recommending the services of other professionals.

5. Responsibility to Non-Participating Parties. A neutral should consider and, where appropriate, encourage the parties to consider, the interests of persons – especially children– who are not participating in the process but are affected by actual or potential agreements.

6. Advertising, Soliciting or Communications by Neutrals. Neutrals must be truthful in advertising, soliciting or other communications regarding the provision of dispute resolution services. Neutrals must not make claims of specific results, benefits, outcomes or promises which imply favor of one side over another.

7. Confidentiality. A neutral must maintain the confidentiality of all information disclosed during a dispute resolution proceeding except for particular exceptions included in the Standard.

   Confidential information includes at least the following: the identity of the parties; the nature and substance of the dispute; the neutral's impressions, opinions and recommendations; the neutral's notes; statements, documents or other physical evidence disclosed by any participant; and the terms of any settlement award or other resolution of the dispute, unless disclosure is required by law or court rule.

   - The neutral must inform the parties that the neutral will not voluntarily disclose information unless the disclosure is required by law.

   - The neutral must not disclose information obtained in a private discussion with a party unless the party permits disclosure.

   - The neutral may, for supervisory and monitoring purposes, discuss confidential information with supervisors, administrative staff and other neutrals in the court-connected dispute resolution program with which the neutral is affiliated.

   - The neutral may, with prior permission of the parties and after removing identifying information, use information disclosed by the parties for research, training or statistical purposes.

8. Withdrawal.

- A neutral must withdraw from a dispute resolution process if continuing in the process would violate an Ethical Standard or jeopardize the safety of a party, or if the neutral is unable to provide effective services.

- The neutral must conduct a withdrawal, to the extent possible, so that the parties' safety and are rights are protected.

- A neutral may withdraw if she or he believes one of the following: a party is not acting in good faith; the agreement would be illegal or involve the commission of a crime; continuing the process would give rise to an appearance of impropriety; the process could cause severe harm to a non-participating party or the public; or continued discussions would not be in the best interest of the parties, their minor children, or the dispute resolution program.

Rule 9 – Ethical Standards

Hypothetical Case Scenarios

Scenario #1

The conciliator knows the lawyer for one of the parties; the lawyer was a college classmate of the conciliator, and they see each other yearly at college reunions.

Scenario #2

The parties disagree about the meaning of the settlement agreement they worked out with the conciliator, and counsel for Party A issues a deposition subpoena, ordering the conciliator to testify about the discussion in the conciliation and to bring her notes from the conciliation session. Party B opposes the testifying of the conciliator.

Scenario #3

In a business divorce case, Partner A discloses to the conciliator that he is personally about to receive a substantial contract from one of the partnership's best clients, and that her partner does not know this; Partner B would balk at their 50/50 division of assets if he knew. Partner A insists that the conciliator not disclose this information to her partner or she will quit the conciliation.

Scenario #4

Consumer dispute with an insurance company over alleged over-charge; conciliator is currently in a dispute with his insurance company over another issue (underpayment on a loss claim.) Disclose?

Scenario #5

An insurance company asks the conciliator's law firm to handle an unrelated matter after the conciliation is concluded.

Scenario #6

A conciliator learns during the conciliation that Party A's attorney has filed a false affidavit in another (related) case which is now settled; the principles of legal ethics require lawyers to report misconduct by other attorneys, but the conciliator has stated that he will maintain the confidentiality of everything discussed in the conciliation.

Scenario #7

In an unsafe-conditions case, the conciliator learns in a private session that the tenant would be willing to vacate the premises in exchange for a payment of $1,000, but that is her bottom line; she asks the conciliator to tell the landlord that she wants $1,500. The conciliator inadvertently discloses to the landlord that the tenant would be willing to leave if paid $1,000.

Questions:

a. What ethical standards apply and/or would be helpful in providing guidance for the conciliator in this scenario?
b. What course of action would you take as the conciliator?
c. How would you do it? What would you say to the parties? (Role play this in your small group.)

Rule 9 – Ethical Standards
Hypothetical Case Scenarios *with Commentary*

Scenario #1 **(Conflict of Interest)**
The conciliator knows the lawyer for one of the parties; the lawyer was a college classmate of the conciliator, and they see each other yearly at college reunions.

Commentary: The Conflict of Interest Rule 9(e)(i) states that "the neutral shall disclose to all parties participating in the process all actual or potential conflicts of interest, including but not limited to the following: (aa) any known current or past personal or professional relationship with any of the parties or their attorneys." In this case, the issue is whether the relationship described is a "personal or professional" relationship. Among the factors that might be relevant are the following: (a) do the conciliator and the classmate consider each others friends or were they friends in college; (b) has either of them referred business to the other, or do they have any kind of relationship; and (c) have they had contact with each other besides during reunions. Even if, after weighing such factors, disclosure seems unnecessary, the best course may be to err on the side of disclosure, so that the parties have the information they need in order to make an informed decision about whether they are comfortable with the conciliator.

Scenario #2 **(Confidentiality)**
The parties disagree about the meaning of the settlement agreement they worked out with the conciliator, and counsel for Party A issues a deposition subpoena, order the conciliator to testify about the discussions in the conciliation and to bring her notes from the conciliation session. Party B opposes the testifying of the conciliator.

Commentary: Rule 9(h) states that "A neutral shall maintain the confidentiality of all information disclosed during the courts of dispute resolution proceedings, subject only to the exceptions listed in this section." One of the exceptions is stated in Rule 9(h)(i): "unless disclosure is required by law or court rule." In this case, it is counsel for one of the parties, not the court, which has issued the subpoena for the conciliator's testimony. Therefore there is no ruling from the court as to the propriety of the subpoena. If the attorney had the authority to issue the subpoena, the conciliator still has the right (and possibly, under these Rules, the obligation) to see the guidance of the court in which the case is pending as to whether s/he must comply with the subpoena. (See Commentary to Rule 9(h)(v): "The provisions in this section concerning confidentiality govern the ethical obligation of the neutral but may not bar compelled disclosure of confidential communications, by means of subpoena or other court process.")

Scenario #3 **(Withdrawal)**
In a business divorce case, Partner A discloses to the conciliator that he is personally about to receive a substantial contract from one of the partnership's best clients, and that her partner (Partner B) does not know this; Partner B would balk at their 50/50 division of assets if he knew. Partner A insists that he conciliator not disclose this information to her partner or she will quit the conciliation.

Commentary: The Withdrawal Rule 9(i)(ii) permits, but does not require, the neutral to withdraw when the neutral "believes that (aa) one or more parties is not acting in good faith; ...(cc) continuing the dispute resolution process would give rise to an appearance of impropriety; ... and (ee) continuing discussions would not be in the best interests of the parties" In this case, Partner B will probably be disadvantaged by continuation of the conciliation. In addition, the conciliator's knowledge of the contract could give rise to an appearance of impropriety or be perceived as a failure to act in good faith (especially if the parties have agreed to exchange all relevant financial information.) It is worth noting that if the conciliator decides to withdraw, s/he must do so in a manner that does not breach the confidentiality of the Partner A's communications to the conciliator. (See Rule 9(i)(i); "Withdrawal must be accomplished in a manner which, to the extent possible, does not prejudice the rights or jeopardize the safety of the parties.")

Scenario #4 **(Impartiality)**
Consumer dispute with an insurance company over alleged over-charge; conciliator is currently in a dispute with his insurance company over another issue (underpayment on a loss claim.) Disclose?

Commentary: Rule 9(b)(i) requires the neutral to be impartial "with respect to all of the parties and the subject matter of the dispute." This duty applies throughout the dispute resolution process. Among the issues in this care are: (a) whether the neutral, in spite of his personal dispute with his own insurance company, feels about to be impartial; (b) whether one of the parties, if s/he have been impartial, thus calling into question the integrity of the process; and (c) whether, even if the neutral concludes that he can be impartial, an objective person would find that decision to be reasonable under the circumstances of that case. The Rules probably do not require the disqualification of the conciliator solely on the grounds that s/he has been involved in a dispute with an insurance company, but such factors as how recent the dispute was, how intense a dispute it was, how long it lasted, and the resulting impact (if any) on the conciliator's views about insurance companies might be relevant to the question of whether the conciliator should make a disclosure of some kind. When in doubt, the best course in such situations may be to err on the side of disclosure, so that the parties have the information they need in order to make an informed decision about whether they are comfortable with the conciliator.

Scenario #5 **(Conflict of Interest)**
An insurance company asks the conciliator's law firm to handle an unrelated matter after the conciliation is concluded.

Commentary: Rule 9(e)(iv) states that "a neutral must avoid even the appearance of a conflict of interest both during and after the provision of services" (emphasis added.) In this case, there is at least a risk of such an appearance. The Rule goes on to prohibit the neutral (but not the neutral's firm – see Commentary) from handling an unrelated matter for one of the parties for one year, unless the parties consent. (Although the Rule does not say when the year begins, a reasonable assumption might be from the time when the neutral's services ended) Thus, it appears that the Rules do not expressly prohibit the conciliator's firm from taking the new case, as long as (a) the

conciliator does not work on the case, and (b) the firm's taking the case would not create the appearance of impropriety. . Among the factors that might be relevant to the question of "impropriety" are: (a) was the insurance company's decision to hire the firm unrelated to the conciliation; (b) is the new matter substantial; and (c) did the insurance company and the firm have a prior relationship.

Scenario #6 **(Confidentiality)**

A conciliator learns during the conciliation that Party A's attorney has filed a false affidavit in another (related) case which is now settled; the principles of legal ethics require lawyers to report misconduct by other attorneys, but the conciliator has stated that he will maintain the confidentiality of everything discussed in the conciliation.

Commentary: Rule 1(a) of the Uniform Rules on Dispute Resolution states that "To the extent that there is any conflict between these rules and the ...Rules of the Supreme Judicial Court, the Supreme Judicial Court... rules shall control." The lawyer's ethical duty to report misconduct by another member of the bar is contained in the Rules of Professional Conduct adopted by the SJC, and therefore those Rules are arguably controlling. This issue is one on which the conciliator would probably be well advised to obtain independent advice. In doing so, the conciliator should of course refrain from disclosing the identity of the parties to the conciliation or the substance of their communications, to the extent consistent with whatever duty the conciliator may have to report the attorney's actions.

Scenario #7 **(Confidentiality)**

In an unsafe-conditions case, the conciliator learns in a private session that the tenant would be willing to vacate the premises in exchange for a payment of $1,000, but that is her bottom line; she asks the conciliator to tell the landlord that she wants $1,500. The conciliator inadvertently discloses to the landlord that the tenant would be willing to leave if paid $1,000.

Commentary: The Confidentiality Rule 9 (h) does not provide guidance on the question of curing an inadvertent breach of confidentiality by the neutral. Among the possible course of action are (a) to say to the landlord that the conciliator misspoke when s/he communicated the $1,000 figure and that the correct figure was $1,500; (b) to explain to the tenant what happened and find out if there are any terms that the tenant would wish to make part of her proposal if the proposal were to stand at $1,000; or (c) to discuss the situation with the tenant and explore the options that the tenant may prefer as a way of rectifying the breach. Although not ethically required, an apology on the part of the conciliator would be in order.

Ten Principles of Mediation Ethics

By David A. Hoffman

An important subject for mediators is how to distill from the various codes of mediation ethics the essential principles that these codes have in common. Such codes -- each with somewhat differing provisions -- have been developed by the Society of Professionals in Dispute Resolution, the Academy of Family Mediators, and the American Bar Association, among others. The ten principles outlined below are a compilation of what I believe are commonly accepted principles of mediation ethics.

This list, of necessity, over-simplifies the subject; a brief article cannot capture all of the nuances of ethical principles. Also, this list borrows heavily from many writing in the field – indeed, the point of such a list is not originality but an attempt to discern the principles on which there is consensus. Finally, this list is a work in process; principles and standards are evolving as the field of mediation matures. For the moment, however, the following seem to be the basic principles of mediation ethics.

1. Conflict of interest. Mediators must avoid serving in cases where they have a direct personal, professional, or financial interest in the outcome of the dispute. This duty becomes more complicated where the mediator's interest is indirect – e.g., she works in a firm with someone who has an interest in the outcome, or she is related to someone who has such an interest. In those cases, the question is *how* indirect is the interest? Is it simply a matter of disclosure or does it preclude serving in the case? Mediators should also avoid an appearance of a conflict – Prof. Frank Sander talks about applying the "headline test": how would you feel about the potential conflict appearing on the front page of the newspaper? Mediators should err on the side of disclosure. If the disclosure is made well in advance of the mediation, so that the parties have the opportunity to choose another mediator, their acceptance of the mediator – after full disclosure -- generally resolves the potential conflict. In some cases, however, the mediator should decline the case if the conflict is so severe that even waiver does not cure it, or the appearance of impropriety is so strong that it cannot be resolved by full disclosure.

2. Competence/professional role boundaries. Mediators have a duty to know the limits of their ability; to avoid taking on assignments they are not equipped to handle; and to communicate candidly with the parties about their background and experience. Sometimes the parties want a mediator with subject matter expertise (such as divorce), or a particular set of process skills (such as multiparty public policy negotiations). We must defer to their judgment about these matters by disclosing our degree of competence and letting them decide. Sometimes we get chosen to handle an assignment where we may lack competence; it is our duty to turn it down, even if the parties, having heard our

protestations, want us anyway. Observing professional role boundaries is the corollary of this duty. As mediators, we must avoid providing other types of professional service, even if we are licensed to provide it. Mediators who are engineers, therapists, lawyers or what have you, should leave the parties' engineering, therapy and law-related needs to others. Even though we may be competent to provide those services, we compromise our effectiveness as mediators when we wear two hats.

3. Impartiality. Mediation requires engagement, and it is difficult to engage the parties without developing some feelings about them. The duty to remain impartial throughout the mediation – from beginning to end -- does not require us to withdraw from the case if we become aware of such feelings, but instead to act in such a way that those feelings (whatever they may be) are kept to ourselves. Our words, manner, affect, body language, and process management must reflect an even-handed approach. If our feelings about the parties are such that we can no longer be even-handed in our dealings with them, we must withdraw from the case.

4. Voluntariness. Although some parties come to mediation because they are required to do so (e.g., ordered by a judge, or compelled to mediate under a dispute resolution clause in a contract), they must have the right at a certain point to walk away from the table. In other words, even in a mandatory mediation setting, the parties' duty is to participate in good faith and make an effort to negotiate a resolution. However, mediators should remind the parties that any agreement they reach must be a product of their own free will, and therefore they may withdraw from the process if it is not moving in the direction of an agreement that they prefer to the alternative – i.e., continuation of the dispute or resolution of it in some other manner.

5. Confidentiality. There are two aspects of the duty of confidentiality. First, mediators must safeguard the privacy and confidentiality of the mediation process vis-a-vis third parties – i.e., those outside the mediation. Second, when a mediator meets separately with one of the parties, she must maintain the confidentiality of anything said in that private session which that party does not want the other party or parties to know. In addition, mediators have a duty to inform the parties of any relevant limits of confidentiality, such as mandated reporting of child abuse or the planned commission of a crime.

6. Do no harm. This familiar principle (borrowed from the Hippocratic Oath) requires mediators to avoid conducting the process in a manner that harms the participants or worsens the dispute. Some people suffer from emotional disturbances that make mediation potentially damaging psychologically; some people come to mediation at a stage when they are not ready to be there. Some people are willing and able to participate, but the mediator handles the process in a way that inflames the parties' antagonism toward each other rather than resolving

it. We should modify the process (e.g., meet separately with the parties, or meet only with counsel) where necessary, and withdraw from the mediation if it becomes apparent that, even as modified, mediation is inappropriate or harmful. In a word, we must avoid adding fuel to the fire. To be sure, there are circumstances in mediation (as in medicine) where the problem may have to get worse before it can get better; venting emotions can be a painful process. Before employing this technique, however, the mediator must be confident that she has the skill and experience to avoid making matters worse.

7. Self-determination. Party autonomy is one of the guiding principles of mediation. Supporting and encouraging the parties in a mediation to make their own decisions (both individually and collectively) about the resolution of the dispute, rather than imposing the ideas of the mediator or others, is fundamental to the process. Mediators are frequently asked by the parties: What would you do? What do you think is fair? What do the courts usually do in cases of this kind? Our job is to help the parties find their own answers – i.e., arrive at a resolution that meets their tests of fairness rather than our own. Mediators should also prevent one party from dominating the other parties in the mediation in a manner that prevents them from being able to make their own decisions.

8. Informed consent. A voluntary, self-determined resolution of a dispute will serve the parties' interests only if it an informed choice. Although the mediator need not be (and usually should not be) the source of the parties' information, mediators should make sure that the parties have enough data to assess their options for settlement and their alternatives to settlement. If the parties lack this information, the mediator should talk to them about how they might obtain it.

9. Duties to third parties. Just as the mediator should do no harm to the parties, she should also consider whether a proposed settlement might harm others who are not participating in the mediation. This is particularly important when the third parties affected by a mediated settlement are children or other vulnerable people (such as the elderly or infirm). In some cases, the affected third parties might be the general public – e.g., in a case involving allegations of faulty construction of a public project, such as a bridge or highway. Since third parties are not directly involved in the process, the mediator may have a duty in some cases to ask the parties for information about the impact of the settlement on others and encourage them to bring the interests of one or more third parties to bear on the discussions in the mediation.

10. Honesty. For mediators, the duty of honesty means, among other things, full and fair disclosure of (a) their qualifications and prior experience, (b) any fees that the parties will be charged for the mediation, and (c) any other aspect of the mediation which may affect their willingness to participate in the process. Honesty also means telling the truth when meeting separately with the parties. For

example, if Party A confidentially discloses his "bottom line," and Party B asks the mediator if she knows the opponent's bottom line, saying "no" would be dishonest. (Instead, the mediator might say that she has discussed a number of things with the Party A on a confidential basis and therefore is not at liberty to respond to the question, just as she would be precluded from disclosing certain things she learned from Party B.) When mediating separately and confidentially with the parties in a series of private sessions, the mediator is in a unique and privileged position; she must not abuse the trust the parties place in her even if she believes that bending the truth will further the cause of settlement.

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CONFIDENTIALITY OF MEDIATION IN MASSACHUSETTS UNDER STATUTE AND COURT RULE

Massachusetts General Laws Chapter 233, section 23C

§ 23C, Work product of mediator confidential; confidential communications; exception; mediator defined.

All memoranda, and other work product prepared by a mediator and a mediator's case files shall be confidential and not subject to disclosure in any judicial or administrative proceeding involving any of the parties to any mediation to which such materials apply. Any communication made in the course of and relating to the subject matter of any mediation and which is made in the presence of such mediator by any participant, mediator or other person shall be a confidential communication and not subject to disclosure in any judicial or administrative proceeding; provided, however, that the provisions of this section shall not apply to the mediation of labor disputes.

For the purposes of this section a "mediator" shall mean a person not a party to a dispute who enters into a written agreement with the parties to assist them in resolving their disputes and has completed at least thirty hours of training in mediation and who either has four years of professional experience as a mediator or is accountable to a dispute resolution organization which has been in existence for at least three years or one who has been appointed to mediate by a judicial or governmental body.

Supreme Judicial Court Uniform Rules on Dispute Resolution

Rule 9. Ethical Standards, Section (h)

A neutral shall maintain the confidentiality of all information disclosed during the course of dispute resolution proceedings, subject only to the exceptions listed in this section.

(i) The information disclosed in dispute resolution proceedings that shall be kept confidential by the neutral includes, but is not limited to: the identity of the parties; the nature of the substance of the dispute; the neutrals impressions, opinions, and recommendations; notes made by the neutral; statements, documents, or other physical evidence disclosed by any participant in the dispute resolution process; and the terms of any settlement, award, or other resolution of the dispute, unless disclosure is required by law or court rule.

(ii) Confidentiality vis a vis nonparties. The neutral shall inform the participants in the dispute resolution process that he or she will not voluntarily disclose to any person not participating in the mediation any of the information obtained through the process, unless such disclosure is required by law.

(iii) Confidentiality within the mediation. A neutral shall respect the condidentiality of information received in a private session or discussion with one or more of the parties in a dispute resolution process, and shall not reveal this information to any other party in the mediation without prior permission for the party from the information was received.

(iv) Neutrals who are part of a court connected dispute resolution program may, for the purposes of supervising the program, supervising neutrals and monitoring of agreements, discuss confidential information with other neutrals and administrative staff in the program. This permission to discuss confidential information does not extend to individuals outside the program.

(v) Neutrals may, with prior permission from the parties, use information disclosed by the parties in dispute resolution proceedings for research, training, or statistical purposes, provided the materials are adapted so as to remove any identifying information.