

NEW HAMPSHIRE

53.1 Alternative Dispute Resolution (ADR)

(a) ADR Considered. ADR will be discussed at the preliminary pretrial conference, and the court will promote settlement efforts at every stage of the proceedings.

(b) Summary Jury Trial.

(1) How Set. The court may order a summary jury trial upon written request of all counsel involved or upon the court's own initiative. The only condition precedent to a request for a summary jury trial is that counsel shall have their case in a state of trial readiness.

(2) Procedure. The court will determine the procedure to be followed with respect to summary jury trials.

(c) Mediation.

(1) Discovery Plan. Counsel shall confer regarding the suitability of their case for mediation and, if applicable, include in their discovery plan (See Civil Form 2, Sample Discovery Plan) the date by which mediation will occur.

(2) Mediation Program. Either by the court or by agreement of the parties, any eligible civil action may be referred to mediation according to the Guidelines for Mediation Program. A copy of the Guidelines may be obtained from the clerk's office or the court's web site. Should the parties agree to court sponsored mediation in the Discovery Plan or in a subsequently filed joint mediation statement, the parties shall within 48 hours conventionally file a list of five (5) possible mediators from the court's approved list in descending order of preference. The list of possible mediators shall not be maintained in the case file.

Mediation Program Information:

<http://www.nhd.uscourts.gov/cp/mediation/default.asp>

GUIDELINES FOR MEDIATION PROGRAM

January 1, 2006

1. Designation of Mediators

(a) The chief judge shall designate ten (10) or more mediators under this rule.

(b) An individual may be designated to serve as a mediator if he or she: (1) has been for at least ten (10) years a member in good standing of the bar of this court; (2) is determined by the chief

judge to be competent to perform the duties of a mediator; and (3) has participated in twenty (20) hours of mediation training from a recognized ADR organization, university or court.

(c) Each mediator shall, for the purpose of performing his or her duties, be deemed a quasi-judicial officer of the court.

2. Designation of Compliance Judge

The magistrate judge is designated to serve as the compliance judge for mediation. This compliance judge shall be responsible to the chief judge for administration of the mediation program established by this rule and shall entertain any procedural or substantive issues arising out of mediation. Complaints regarding the Alternative Dispute Resolution (ADR) process and requests for interpretation and/or enforcement of mediation rules, including ethical requirements, shall be made to the magistrate judge.

3. Compensation of Mediators

Each mediator shall be compensated at their hourly rate as published on the court's website for service in each civil action referred to mediation. The mediator's compensation shall be divided equally between/among the parties. Notwithstanding this provision, the court may request from each mediator up to six (6) hours of service each year without compensation.

4. Civil Actions Eligible for Mediation

Each judge or magistrate judge in the district may, without the consent of the parties, refer to mediation any civil actions. Notwithstanding the above, the parties in any civil action may agree to mediation and may select a mediator from the court's panel of mediators or from any noncourt source. If counsel or any party believe the magistrate judge or any panelist should not be selected as the mediator because of conflict of interest or appearance of impropriety, the reason shall be promptly set forth by letter to the magistrate judge or district judge presiding on the case.

5. Mediation Procedure

(a) Counsel and the parties in each civil action referred to mediation shall participate therein and shall cooperate with the mediator, who shall be designated by the compliance judge.

(b) Whenever a civil action is referred to mediation the parties shall immediately prepare and send to opposing counsel and to the designated mediator, a position paper not exceeding ten (10) pages in length. The parties may append to their position papers essential documents only. Pleadings shall not be appended or otherwise submitted unless specifically requested by the mediator. In addition, a confidential position paper shall be provided solely to the mediator which realistically assesses the case.

(c) Counsel and the parties (including individuals with settlement authority or specific individuals) shall attend mediation sessions as requested by the mediator. Counsel and parties shall participate in good faith in all mediations whether the mediation was requested or ordered.

(d) The mediator may meet with counsel and the parties jointly or *ex parte*. All information presented to the mediator shall, on request, be deemed confidential and shall not be disclosed by

anyone, including the mediator, without consent, except as necessary to advise the court of an apparent failure to participate. The mediator shall not be subject to subpoena by any party. No statements made or documents prepared for mediation shall be disclosed in any subsequent proceeding or construed as an admission.

(e) No proceedings (including motion practice and discovery) shall be stayed upon referral to mediation except upon application. Any application for a stay of proceedings shall be made jointly by the parties and shall be considered by the referring judge or magistrate judge.

6. Ethical Standards for Mediators

(a) Impartiality. A mediator shall be impartial and advise all parties of any circumstances bearing on possible bias, prejudice, or impartiality. Impartiality means freedom from favoritism or bias in word, action, and appearance. Impartiality implies a commitment to aid all parties, as opposed to an individual party, in moving toward an agreement.

(1) A mediator shall maintain impartiality while raising questions for the parties to consider as to the reality, fairness, equity, and feasibility of proposed options for settlement.

(2) A mediator shall withdraw from mediation if the mediator believes he or she can no longer be impartial.

(3) A mediator shall not accept or give a gift, request, favor, loan, or any other item of value to or from a party, attorney, or any other person involved in and arising from any mediation process.

(b) Conflicts of Interest and Relationships; Required Disclosures; Prohibitions.

(1) A mediator must disclose to the parties and to the compliance judge any current, past, or possible future representation or consulting relationship with, or pecuniary interest in, any party or attorney involved in the mediation.

(2) A mediator must disclose to the parties any close personal relationship or other circumstance, in addition to those specifically mentioned in subsection (b)(1) above, which might reasonably raise a question as to the mediator's impartiality.

(3) The burden of disclosure rests on the mediator. All such disclosures shall be made as soon as practical after the mediator becomes aware of the interest or the relationship. After appropriate disclosure, the mediator may serve if all parties so desire. If the mediator believes or perceives that there is a clear conflict of interest, the mediator shall withdraw irrespective of the expressed desires of the parties.

(4) In no circumstance may a mediator represent any party in any matter during the mediation.

(5) A mediator shall not use the mediation process to solicit, encourage, or otherwise incur future professional services with any party.

7. Admissions.

Mediation statements and documents will be destroyed after the mediation. Neither the mediation statements nor communications of any kind occurring during mediation shall be construed as an admission or be deemed admissible at trial.

Model Standards of Conduct for Mediators

STANDARD I. SELF-DETERMINATION

- A. A mediator shall conduct a mediation based on the principle of party self determination.
- B. 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.
- C. A mediator shall not undermine party self-determination by any party.
- D. Parties may exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process, and the outcome.
- E. Although party self-determination for process design is a fundamental principle of the mediation, a mediator may need to balance such party self determination with the mediator's duty to conduct a quality process in accordance with these Standards.
- F. While a mediator cannot personally ensure that each party has made free and informed choices to reach particular decisions, where appropriate, a mediator should make the parties aware of the importance of consulting professionals and others, if necessary, to help them make informed choices.

STANDARD II. IMPARTIALITY

- A. A mediator shall decline a mediation if the mediator cannot conduct all aspects of the mediation in an impartial manner.
- B. Impartiality means freedom from favoritism, bias, or prejudice.
- C. A mediator shall conduct all aspects of the mediation in an impartial manner and avoid conduct that gives the appearance of partiality.
- D. A mediator shall 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.
- E. A mediator shall not give or accept a gift, favor, loan or other item of value that raises a question as to the mediator's actual or perceived impartiality.

F. 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 the mediator's actual or perceived impartiality.

G. If at any time a mediator is unable to conduct all aspects of the mediation in an impartial manner, the mediator should notify the parties and 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 the mediation.

B. A conflict of interest can arise from involvement by a mediator with the subject matter of the dispute or from any relationship between the mediator and any mediation participant, whether past or present, personal or professional, that reasonably raises a question of the mediator's impartiality.

C. A mediator shall make a reasonable inquiry to determine whether there are any facts that a reasonable individual would consider likely to create potential or actual conflict of interest for the mediator.

D. 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.

E. 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.

F. If a mediator's conflict of interest might reasonably be viewed as undermining the integrity of the mediation, the mediator shall withdraw from or decline to proceed with the mediation, unless the parties and their counsel are fully informed of all relevant circumstances, and expressly agree in writing to the contrary.

STANDARD IV. COMPETENCE

A. A mediator shall mediate only when the mediator has the necessary competence to satisfy the reasonable expectations of the parties.

B. Any person from the Court's Mediation Panel 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.

C. A person who offers to serve as a mediator creates the expectation that the person is competent to mediate effectively.

D. A mediator should attend educational programs and related activities to maintain and enhance the mediator's knowledge and skills related to mediation.

E. A mediator should have available for the parties' information relevant to the mediator's training, education, experience, and approach to conducting a mediation.

F. 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.

G. 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.

B. If the parties to a mediation agree that a mediator may disclose information obtained during the mediation, the mediator may do so.

C. A mediator shall not communicate to any non-participant information about how the parties acted in the mediation.

D. A mediator may report only the following information, and no more, to the Court at the conclusion of the mediation:

1. whether parties (and/or appropriate representatives) appeared at a scheduled mediation;
2. whether the parties submitted mediation statements; and
3. whether or not the parties reached a resolution.

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

F. 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.

G. A mediator shall promote understanding among the parties of the extent to which the parties will maintain confidentiality of information they obtain during the mediation process.

H. Depending on the circumstance of the mediation, the parties may have varying expectations regarding confidentiality that a mediator should address. The parties may agree make their own rules with respect to confidentiality.

STANDARD VI. QUALITY OF THE PROCESS

A. A mediator shall conduct all aspects of the 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.

B. A mediator shall agree to mediate only when the mediator is prepared to commit the attention essential to an effective mediation.

C. A mediator shall only accept cases when the mediator can satisfy the reasonable expectation of the parties concerning the timing of the mediation.

D. The presence or absence of necessary persons at the mediation depends on the agreement of the parties and the mediator. The parties and mediator may agree that other persons may be excluded or included from particular sessions or from all sessions of the mediation.

E. A mediator should promote honesty and candor between and among, all participants.

F. A mediator shall not knowingly misrepresent any material fact or circumstance in the course of the mediation.

F. 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, the 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.

G. 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.

H. A mediator may recommend, when appropriate, that parties consider resolving their dispute through arbitration, counseling, neutral evaluation or other processes.

I. A mediator shall not undertake an additional dispute resolution role in the same matter without the consent of the parties. Before providing such service, the 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.

J. 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.

K. If a party appears to have difficulty comprehending the process, issues, or settlement options, or difficulty participating in a mediation, a 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.

L. 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.

M. If a mediator believes that participant conduct, including that of the mediator, jeopardizes conducting a mediation consistent with these Standards, the mediator shall take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.

STANDARD VII. COMMUNICATIONS BY THE MEDIATOR

A. A mediator shall be truthful and not misleading when communicating with others about the mediator's qualifications, experience, services, and fees.

B. A mediator shall not include any promises as to outcome in communications.

C. A mediator shall not communicate in a manner that gives an appearance of partiality for or against a party or otherwise undermines the integrity of the process.

D. 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.

B. 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.

C. A mediator's fee arrangement and statement for services rendered should be in writing unless the parties agree otherwise.

D. A mediator shall not charge fees in a manner that impairs the mediator's impartiality.

E. A mediator shall not enter into a fee agreement which is contingent upon the result of the mediation or amount of the settlement.

F. While a mediator may accept unequal fee payments from the parties, the mediator shall not allow such a fee arrangement to adversely impact the mediator's ability to conduct the 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, such as:

1. Foster diversity within the field of mediation.
2. Strive 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. Participate in research when given the opportunity, including obtaining participant feedback when appropriate.
4. Participate in outreach and education efforts to assist the public in developing an improved understanding of, and appreciation for, mediation.
5. Assist 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.