

HOW CAN A MEDIATOR BE BOTH IMPARTIAL AND FAIR: WHY ETHICAL STANDARDS OF CONDUCT CREATE CHAOS FOR MEDIATORS

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How Can A Mediator Be Both Impartial and Fair:
Why Ethical Standards of Conduct Create Chaos for Mediators

ABSTRACT

Currently, a mediator is faced with a dilemma. All state ethical standards of conduct (“Standards”), whether promulgated by a governmental entity or professional organization, require mediator impartiality. Yet many Standards also require a mediator to attain a fair result, achieve other concepts of fairness, balance power struggles and promote informed decisions. Is it possible for a mediator to conform to all of these qualities?

This article provides extensive research and analysis regarding Standards that focus on mediator impartiality and fairness. The research establishes that Standards create chaos for the practicing mediator to the extent they include vague and internally inconsistent provisions.

To avert the chaos, therefore, we must begin a dialogue. Although this author is not ready to commit to a single course of action, various recommendations are posed to help start the conversation, while at the same time recognizing the fluid nature of mediation. The recommendations include:

1. Take no action, otherwise known as the no-action alternative. This alternative is limited to those states that have not yet developed Standards.
2. Revise ethical standards of conduct and definitions of mediation to delete requirements of mediator impartiality. By simplifying the definition of mediation – “a process of using a third party to assist disputants to reach a desired goal” – this alternative deletes requirements of mediator impartiality and aligns with the current trend toward achieving some aspect of fairness.
3. Modify existing Standards to clarify otherwise vague provisions, enhance corresponding commentary, and where necessary, create a hierarchy of ethical concerns within a single set of Standards.

I. INTRODUCTION

“Agreed! I will accept those terms to finally settle this matter.” As the mediator hears these words, a pang of apprehension begins to creep through her body. Both parties have agreed to settle the matter, yet the mediator is concerned about the substantive fairness of the final result. Under the law, the mediator knows that both children have a right to share equally in the deceased’s estate. Having discussed the values of the personal items being divided, coupled with the remaining money in a mutual fund, the mediator realizes that the division does not even come close to a 50/50 split. In the mediator’s opinion, the agreed upon division looks more like an 80/20 division of assets. What could possibly prompt the parties, especially the party on the low end, to agree to such a division? The mediator has been with the parties for most of the day. Yet neither party has divulged any information about individual interests that might help the mediator to understand the final result.

Should the mediator tell the party who has agreed to receive the smaller amount that under the law he is entitled to fifty percent? Should the mediator recommend that the party seek advice from an outside attorney? Should the mediator provide legal information, ask questions to ensure that the parties understand the ramifications of the settlement, or provide her own evaluative opinion regarding the proposed final result? The mediator finds herself caught in a typical mediation quandary: neutrality, impartiality and party self-determination versus fairness and a just result.¹

¹ It is difficult to categorize the mediator’s dilemma into one ethical principle. The mediator’s ability to act in a certain way or her reluctance to overstep in one area will, in all likelihood, affect other ethical principles. See Robert A. Baruch Bush, A Study of Ethical Dilemmas and Policy Implications, 1994 J. DISP. RESOL. 1, 46 (1994) (acknowledging that when a mediator offers advice or attempts to suggest a more balanced solution than that offered by the parties, she compromises party self-determination and the nondirective approach that mediators should

The above scenario is one illustration of the tension between mediator obligations of impartiality and fairness. It demonstrates that a mediator's ethical duty to remain impartial may be compromised by mediator conduct that relates to a final outcome. Keep in mind that mediator impartiality also may be considered in other contexts.²

Guidelines, ethical rules, legislative enactments, general standards of conduct (hereafter referred to collectively as "Standards") as well as ethics opinions and an individual's "gut" reaction enlighten mediators of their ethical obligations. Yet the Standards do not address the mediator's ethical dilemma, which may be exacerbated by the need to fulfill a particular mediation style or behavior.³

This article focuses on newly developing Standards designed to regulate the mediation industry with respect to civil disputes.⁴ The particular focus is on the mediator's requirements of neutrality and impartiality and whether these requirements are impacted by assurances of a fair

maintain); *see also* Jamie Henikoff and Michael Moffitt, *Remodeling the Model Standards of Conduct for Mediators*, 2 HARV. NEGOT. L. REV. 87, 101 (1997) (noting that the fundamental principles of mediation include mediator neutrality, party self-determination and informed consent and acknowledging these three principles as "interdependent variables").

² *See* Paula M. Young, *Rejoice! Rejoice! Rejoice, Give Thanks, and Sing: ABA, ACR, and AAA Adopt Revised Model Standards of Conduct for Mediators*, 5 APPAL. J.L. 195, 209 – 219 (2006) (citing to Greg Firestone's classification of mediator impartiality based on four quadrants of a grid: 1) conflict of interest in terms of a mediator's relationship to the parties and attorneys; 2) the mediator's actions and conduct directed toward the parties; 3) the relationship between the mediator and the outcome; and 4) the mediator's conduct towards the outcome).

³ This article focuses on mediation ethical codes of conduct rather than mediator styles and behavior. I am currently writing a separate law review article that concentrates on mediator styles such as evaluative, facilitative and transformative in relation to the mediator's requirements of neutrality and impartiality. I also have authored an unpublished LL.M. thesis for the Pepperdine University School of Law's Straus Institute for Dispute Resolution, entitled *The Fallacy of a "One Size Fits All" Mediator in Terms of Neutrality and Impartiality: A Study that Compares Mediator Styles with Ethical Standards of Conduct*.

⁴ This article does not address the regulation of family law and divorce mediation because many states regulate these mediations with separate rules and procedures. Many of these rules, in fact, require that a mediator ensure some form of substantive fairness. *See, e.g.*, CAL. FAM. CODE § 3162 (2006) (requiring uniform standards of practice to govern issues involving child custody, requiring mediators to balance the power of the parties, and ensuring that the parties consider the best interest of the children); FLA. R. FAM. LAW R. PROC. 12.740 (2005) (governing the mediation of family law and related issues); KAN. STAT. ANN. § 23-603 (2005) (requiring family law mediators to advise the parties to seek independent legal advice and ensuring that the parties understand how their decision affects the children, including the best interest of the children); MINN. STAT. 518.619 (2005) (setting forth mediator responsibilities for child custody and visitation agreements). In 1986, the Iowa Supreme Court adopted Rules Governing Standards of Practice for Lawyer Mediators in Family Disputes, which require family mediators to assure a "balanced dialogue" and to assume other duties related to fairness. IOWA CT. R. 11.6(2) (West 2005); *see id* at Rules 11.4, 11.5 & 11.7.

result and other fairness concepts such as a balanced process and informed decision making. The basic problem is that mediators are guided by Standards and stand-alone definitions of mediation, yet many Standards contain contradictory or vague provisions. Furthermore, the mediator's actual role may be dictated by her own personal style, values and commercial needs in conjunction with the parties' particular needs.

In this article I conclude that mediation Standards are flawed and need to be clarified with more certainty for the practicing mediator. Professional mediators, scholars, legislators and regulators need to engage in a dialogue to determine how best to correct the flawed Standards.

Part II summarizes the newly developing Standards. It focuses specifically on provisions that relate to impartiality, party self-determination, substantive and procedural fairness, and related fairness concepts such as a balanced process and informed decision making.

Part III analyzes the Standards. Although the Standards appear to set forth clearly articulated policies and goals for mediators, in practicality the difficulty to attain all of them is beyond reach when applied concurrently. Compliance with all Standards is particularly burdensome due to some vague and contradictory provisions. For example, mediators are to be neutral, yet they are not if they advocate one party's position over another. Mediators are to be impartial, but may have difficulty doing so when attempting to balance the power between the disputants. Mediators are to provide a forum for party self-determination, refrain from imposing their own personal judgment and avoid coercive conduct, yet strive for settlement by closing the deal. And so, the mediator's dilemma goes on and on. The dilemma can be particularly burdensome to the attorney mediator who seeks to abide by both the mediator Standards and her own codes of professional conduct for attorneys.⁵

⁵ A comparison of professional standards for mediators and for attorneys is beyond the scope of this article and could serve as a separate article in and of itself.

Part IV offers recommendations that are keyed around the theme that mediators, scholars, legislators and regulars need to engage in a new dialogue. The alternative recommendations are offered to help start the discussions. Part V is a conclusion. Finally, Appendix A presents a chart showing ethical standards of conduct, to the extent they exist, within all fifty of the United States. It focuses on impartiality and fairness concepts.

II. REGULATION THROUGH MEDIATION STANDARDS OF CONDUCT

Over the last three decades, mediation has developed at an astounding rate. Many professional organizations and governmental entities have begun to develop some type of ethical Standards to regulate the mediation practice. In particular, the Standards govern mediator conduct, mediator and party responsibilities and ethics. Some Standards are mandatory because a state's highest court has adopted them for court-sponsored programs,⁶ although many Standards are aspirational at best.⁷

The promulgation of Standards can be divided into three basic categories: 1) governmental regulation by individual states (including smaller governmental units such as a particular county or court); 2) regulation by the National Conference of Commissioners on Uniform State Laws; and 3) regulation by professional organizations. The professional organizations at the forefront of mediation regulation include the American Arbitration

⁶ PHYLLIS BERNARD & BRYANT GARTH, DISPUTE RESOLUTION ETHICS: A COMPREHENSIVE GUIDE 66-67 (2002) (citing Alabama, Florida, Georgia, Kansas, New Jersey, Oklahoma and Virginia as states that have mandatory mediator standards of conduct for court-sponsored mediation programs).

⁷ See Guidelines for Hawaii Mediators, attached to *In the Matter of the Guidelines for Hawaii Mediators* (July 11, 2002) (stating that the Guidelines for Hawaii Mediators are aspirational as adopted by the Hawaii Supreme Court); Iowa Ass'n for Dispute Resolution Model Standards of Conduct for Mediators, *available at* <http://www.iowaadr.org/Standards.htm> (Dec. 5, 2002) (noting that the Model Standards are "aspirational in character"); see also BERNARD & GARTH, *supra* note 6, at 67 (noting that Hawaii, Oregon and Texas are states in which standards for mediators are advisory). Furthermore, unless the mediation practice has a required licensing or certification process, any written guidelines or standards may be deemed voluntary and provide no authority to strip the mediator of his or her right to mediate upon refusal to follow such standards or guidelines.

Association (“AAA”), the American Bar Association (“ABA”), and the Association for Conflict Resolution (“ACR”), which came into existence by the January, 2001 merger of the Society for Professionals in Dispute Resolution (“SPIDR”), the Academy of Family Mediators and the Conflict Resolution Education Network.⁸

Many of the Standards illustrate such principles as party self-determination, voluntary participation, confidentiality, freedom from coercion and mediator impartiality. Although it may appear easy to compartmentalize the various mediation principles, they all inter-relate with a mediator’s ability to ensure a fair result or simply to engage in a reality check for the parties.

This Part II examines provisions in the Standards that relate to a mediator’s neutrality and impartiality as well as requirements of fairness and just result. Subpart A examines the Model Standards of Conduct. Subpart B summarizes the Uniform Mediation Act. Subpart C provides an overview of some of the common principles adopted by the states, followed by a detailed analysis of select state Standards in Subpart D. As shown below, many of the Standards contain vague provisions or expressly or implicitly contain contradictory terms.

A. Model Standards of Conduct for Mediators

From 1992 through 1994, the AAA, ABA and SPIDR jointly prepared the Model Standards of Conduct for Mediators (“1994 Model Standards”).⁹ The 1994 Model Standards were revised and approved by the three organizations in September, 2005 (“revised Model Standards”).¹⁰

⁸ Association for Conflict Resolution home page regarding frequently asked questions, at www.acrnet.org/about/ACR-FAQ2.htm (last visited Feb. 20, 2006).

⁹ See Comparison of 1994 and 2005 Versions of Model Standards of Conduct for Mediators, available at <http://www.abanet.org/dispute/> (last visited Feb. 1, 2006).

¹⁰ See Model Standards of Conduct for Mediators adopted by the ABA House of Delegates in August, 2005, available at <http://www.abanet.org/dispute/> (Aug. 2005).

As with all standards, the revised Model Standards require mediator impartiality,¹¹ avoiding even the appearance of partiality toward one of the parties.¹² Impartiality is defined as “freedom from favoritism, bias or prejudice,”¹³ and is reinforced by provisions that preclude a mediator from acting with partiality or prejudice based on a person’s “personal characteristics, background, values and beliefs, or performance at the mediation, or any other reason.”¹⁴ Impartiality also is addressed in the conflict of interest prohibition.¹⁵ Thus, the requirement of mediator impartiality pervades throughout the mediation to concerns about the process as well as mediator conduct and relationships.

The revised Model Standards specifically acknowledge party self-determination to both process issues and outcomes, and emphasize the parties’ ability to “reach a voluntary, uncoerced decision.”¹⁶ Model Standard I recognizes that party autonomy requires a mediator to juggle several mediation principles – party self-determination and the mediator’s “duty to conduct a quality process . . .”¹⁷ even though a “mediator cannot personally ensure that each party has made free and informed decisions . . .”¹⁸ This latter provision is critical because, unlike other state and professional Standards, it has no stated requirement that a mediator ensure a substantively fair result.

On the other hand, a mediator is to strive for “procedural fairness,” an explicit component of a quality process.¹⁹ Consistent with the notion of a quality process, the 1994 Model Standards

¹¹ Model Standards of Conduct for Mediators, Standard II, *available at* <http://www.abanet.org/dispute/> (Aug. 2005).

¹² *Id.* at Standard II.B.

¹³ *Id.* at Standard II.A.

¹⁴ *Id.* at Standard II.B.1.

¹⁵ *Id.* at Standard III.A & C.

¹⁶ *Id.* at Standard I.A.

¹⁷ Model Standards of Conduct for Mediators, Standard I.A.1, *available at* <http://www.abanet.org/dispute/> (Aug. 2005).

¹⁸ *Id.* at Standard I.A.2.

¹⁹ *Id.* at Standard VI.A.

precluded a mediator from “providing professional advice.”²⁰ They have been revised, however, to follow state standards such as California which allow a mediator to provide information that the mediator is “qualified by training or experience to provide”²¹ A mediator also may recommend that the parties consult with outside professionals to aid informed decision making²² or consider other processes such as arbitration, counseling and neutral evaluation to resolve the dispute.²³

The revised Model Standards have added a new provision at Standard VI.A.10 that links two key components of mediation – party self-determination and a quality process – and does not appear to interfere with mediator impartiality:

If a party appears to have difficulty comprehending the process, issues, or settlement options, or difficulty participating in 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.²⁴

Model Standard VI.A.10 is written in such a manner as to allow a mediator to ensure party self-determination through informed decision making, yet is written in terms that are general enough to allow leeway for the mediator to approach such a situation in an impartial manner. For example, some state Standards include similar provisions and allow the mediator to assist *the party* who is having difficulty understanding aspects of the mediation process or issues. Those state Standards are written in the singular, authorizing the mediator to assist one party. As soon as that happens, however, the mediator potentially steps over her impartiality threshold by assisting one party to the disadvantage of the other. Model Standard VI.A.10 corrects this

²⁰ Model Standards of Conduct for Mediators, Comment 4 to Standard VI, *available at* <http://www.abanet.org/dispute/> (1994).

²¹ Model Standards of Conduct for Mediators, Standard VI.A.5, *available at* <http://www.abanet.org/dispute/> (Aug. 2005).

²² *Id.* at Standard I.A.2.

²³ *Id.* at Standard VI.A.7.

²⁴ *Id.* at Standard VI.A.10.

dilemma for the mediator by not referring to a single party. Rather, it allows the mediator to “explore” appropriate options. As a result, the mediator can carefully craft her language to maintain her neutral and impartial demeanor.

The revised Model Standards show a thoughtful attempt to address the mediation principles emphasized in this article and are an improvement over the 1994 Model Standards. They attempt to balance mediator impartiality with party self-determination and fairness concepts. They also appear to be more attuned to the commercial nature of a mediator’s practice when compared to the original 1994 version.

Nonetheless, the revised Model Standards continue to maintain vague provisions, which can create chaos for the ethical mediator.²⁵ For example, Standard I recognizes the parties’ abilities to reach an “uncoerced decision,” but does not specify whether or not the coercion applies to mediator conduct, a party’s conduct or both. Standard VI.A requires “procedural fairness” but does not define what that means. Standard VI.A also permits a mediator to provide information based on a mediator’s qualifications or experience, yet such a provision seems in direct conflict with the prohibition against providing “professional advice.” These illustrations are just a few examples of the vague nature of the revised Model Standards that relate to this article, namely provisions relating to mediator impartiality, fairness, informed decision making and a balanced process.

B. The Uniform Mediation Act

In 1997, the National Conference of Commissioners on Uniform State Laws (NCCUSL) became aware of the potential problems involving mediators who are subpoenaed to testify in one state regarding communications that transpired during mediation in another state. In

²⁵ *cf* Paula M. Young, *supra* note 2 (providing a thoughtful and insightful explanation of the revised Model Standards albeit her personal interpretation of many vague provisions).

particular, how would the subpoena affect the parties' expectations of confidentiality?²⁶ The drafting committee worked for three years, met ten times, and reviewed extensive comments from interested parties.²⁷ Their work culminated in the preparation of the Uniform Mediation Act (UMA), which was approved in August 2001, at the 2001 NCCUSL Annual Meeting.²⁸

The UMA is intended "to be a 'floor rather than a ceiling.'"²⁹ Excluding the comments, it is a fairly short document and leaves room for the mediating parties, regulators and/or state legislators to develop provisions that are aligned with state law, or specifically tailored to the needs of the parties or the customs and traditions of a geographic area. The UMA focuses primarily on confidentiality and privilege issues. The drafters of the UMA intended to leave ethical standards untouched for the most part, relying instead on the expertise of the professional organizations referenced in Part II.A of this article.³⁰ Technically, therefore, the UMA is not an ethical code of conduct like other mediation standards. It is summarized herein to the extent it addresses issues in this article.

The UMA touches on the concept of mediator impartiality, although the NCCUSL refused to include it as part of the definition of "mediator,"³¹ a recommendation which the Association for Conflict Resolution (ACR) strongly advocated. ACR intended that both the mediator and the process be neutral.³²

²⁶ See Monica Rausch, *The Uniform Mediation Act*, 18 OHIO ST. J. ON DISP. RESOL. 603, 603 (2003) (discussing the motivation behind the NCCUSL's authorization of a committee to draft a Uniform Mediation Act).

²⁷ *Id.* at 604.

²⁸ *Id.*

²⁹ *Id.* at 615 (quoting from the prefatory note of the UMA which states that it is not the intent of the UMA to preempt state and local rules that are consistent with the UMA).

³⁰ David A. Hoffman, *Symposium: Introduction*, 2003 J. DISP. RESOL. 61, 64-65 (2003) (acknowledging the ethical standards already developed by the ABA, AAA, SPIDR and the Association for Conflict Resolution).

³¹ The UMA defines "mediator" as "an individual who conducts a mediation." Uniform Mediation Act, Section 2(3), available at <http://www.law.upenn.edu/bll/ulc/mediat/2003finaldraft.htm> (2003).

³² Rausch, *supra* note 26, at 614.

The principle of impartiality, however, is addressed in Section 9 of the UMA. For example, during the convening process a mediator must inquire as to facts that might affect a mediator's impartiality, including financial, personal and an existing or past relationship.³³ If some relationship is discovered, the mediator shall disclose that information to the mediation parties before actually agreeing to mediate a dispute.³⁴ Additionally, the UMA states that "[a] mediator must be impartial," subject to specified exceptions.³⁵

Although not specifically referring to "impartiality," Section 7 of the UMA is consistent with the notion of mediator impartiality because it prohibits mediator reports to outside authorities such as courts and administrative agencies. The nonreporting principle is consistent with the separate confidentiality principle, which provides that "[u]nless subject to the [insert statutory references to open meetings act and open records act], mediation communications are confidential to the extent agreed by the parties or provided by other law or rule of this State."³⁶

Section 7 has been both lauded and criticized by scholars engaged in the debate as to whether mediators should report bad faith behavior to an appropriate entity.³⁷ Section 7 strikes an appropriate balance because it prohibits mediator reports for purposes of addressing bad faith behavior, yet provides exceptions for communications that evidence outrageous conduct such as abuse, threats to inflict bodily harm and criminal activity.³⁸

³³ Uniform Mediation Act, § 9(a)(1), available at <http://www.law.upenn.edu/bll/ulc/mediat/2003finaldraft.htm> (2003).

³⁴ *Id.* § 9(a)(2).

³⁵ *Id.* § 9(g).

³⁶ *Id.* § 8.

³⁷ Carol L. Izumi and Homer C. La Rue, *Symposium: Prohibiting "Good Faith" Reports Under the Uniform Mediation Act: Keeping the Adjudication Camel Out of the Mediation Tent*, 2003 J. DISP. RESOL. 67, 67 (2003).

³⁸ Uniform Mediation Act, §§ 6-7, available at <http://www.law.upenn.edu/bll/ulc/mediat/2003finaldraft.htm> (2003); see Izumi and La Rue, *supra* note 37, at 69 (concluding that the UMA "strikes the correct balance" in the "good faith" debate).

The UMA is gaining in popularity as more and more states adopt it. As of February 1, 2006, the District of Columbia³⁹ and the following states have adopted the UMA: Illinois,⁴⁰ Iowa,⁴¹ Nebraska,⁴² New Jersey,⁴³ Ohio⁴⁴ and Washington.⁴⁵ Other states that have pending legislation regarding the UMA include: Massachusetts,⁴⁶ New York⁴⁷ and Vermont.⁴⁸ Despite adoption of the UMA, the states continue to use a separate set of Standards to fill in gaps left open by the UMA.⁴⁹

C. *General Principles of Ethical State Standards*

Most states have promulgated some type of Standards to control the mediation process, whether court-connected or by some local or statewide professional association. Appendix A of this article provides a comparison chart of Standards in all fifty states regarding mediator impartiality and fairness concepts. The Standards referenced in Appendix A and in this article are confined to statewide general civil mediation standards. Interestingly, fifteen states have no

³⁹ The District of Columbia adopted the UMA effective January 26, 2006. *See* 2005 Bill Text DC B. 145.

⁴⁰ 710 ILL. COMP. STAT. 35/1 – 35/13, 35/16 & 35/99 (2005). The Illinois UMA was adopted effective January 1, 2004, *id.* at 35/99, and governs agreements to mediate made on or after that date. *Id.* at 35/16.

⁴¹ IOWA CODE ANN. §§ 679C.101 – 679C.115 (West 2005). The governor approved the new legislation on April 28, 2005 and it applies to all mediation agreements entered into on or after July 1, 2005.

⁴² NEB. REV. STAT. ANN. §§ 25-2930 – 25-2942 (Michie 2005). It became effective August 31, 2003.

⁴³ N.J. STAT. ANN. §§ 2A:23C-1 – 2A:23C-13 (2005). The New Jersey UMA was approved November 22, 2004 and took effect immediately to apply to mediation agreements made on and after that date. 2004 N.J. Sess. Law Serv. 157 (West). In addition to the UMA, New Jersey continues to maintain Standards of Conduct for Mediators in Court-Connected Programs, *available at* <http://www.judiciary.state.nj.us/notices/n000216a.htm> (last visited Feb. 3, 2006).

⁴⁴ OHIO REV. CODE ANN. §§ 2710.01 – 2710.10 (Baldwin 2005). The Ohio UMA took effect on October 29, 2005.

⁴⁵ WASH. REV. CODE §§ 7.07.010 – 7.07.904 (2005).

⁴⁶ *See* 2005 MASS. H.B. 19.

⁴⁷ *See* 2005 N.Y. S.B. 1527.

⁴⁸ *See* VT H.B. 33.

⁴⁹ *See e.g.*, e-mail from Anju D. Jessani, Accredited Professional Mediator and incoming President of the New Jersey Association of Professional Mediators, to Susan Nauss Exon, Associate Professor of Law, University of La Verne College of Law (June 27, 2005, 09:37:48 PST) (on file with receiver) (noting that “[t]he UMA focuses rather narrowly on privilege, leaving confidentiality and other elements of mediation participant conduct to be governed by other sources of authority . . .”).

statewide general civil mediation standards while thirty-five do. Of the thirty-five states, twenty-five have court-connected Standards and twelve are offered by professional organizations.⁵⁰

Most of the Standards advocate the importance of party self-determination and the freedom to enter into voluntary settlement agreements.⁵¹ All Standards specifically address the concept of mediator impartiality.⁵² If a mediator is to emphasize party self-determination, voluntary settlements and mediator impartiality, certainly the mediator cannot necessarily ensure that the final result is just and fair to all participants or that the parties are fully informed about their decisions.⁵³ Numerous state Standards caution mediators that they cannot personally ensure

⁵⁰ My research has uncovered both court-connected standards and professional organization standards within some states. Hence, the total number of standards included in Appendix A exceeds fifty.

⁵¹ See Alabama Code of Ethics for Mediators, Standard 4(a), *available at* http://alabamaadr.org/flashSite/Standards/al_code_ethics.html (Mar. 1, 1996) (“A mediator shall assist the parties in reaching an informed and voluntary agreement. Substantive decisions made during mediation are to be made voluntarily by the parties.”); Colorado Model Standards of Conduct for Mediators I, *available at* <http://dola.state.co.us/SmartGrowth/ADRMediators/documents/modelstandards.pdf> (last visited June 16, 2005); Rules Adopted by the Kansas Supreme Court Relating to Mediation, Rule 903(a) and Comments, *available at* <http://www.kscourts.org/ctruls/adrruls.htm> (July 1, 1996) (emphasizing party self-determination and the ability for participants “to reach a voluntary, uncoerced agreement”); Maryland Standards of Conduct for Mediators, Arbitrators and Other ADR Practitioners, Standard I and Comments, *available at* <http://www.courts.state.md.us/macro/standardsfinal.pdf> (last visited Jan. 5, 2006) (noting that mediation is based on the parties’ self-determination, which is a fundamental principle of mediation); Michigan Supreme Court Standards of Conduct for Mediators, Standard 2 (Jan. 4, 2001), *available at* <http://www.courts.michigan.gov/scao/resources/standards/odr/conduct.pdf> (recognizing the importance of party self-determination and the ability to enter into “voluntary, uncoerced agreements”); MINN. GEN. RULES OF PRAC. FOR THE DIST. CTS. 114 Appendix, Mediation Rule 1 (Aug. 27, 1997) (acknowledging party self-determination and the parties’ ability to enter into a “voluntary, uncoerced agreement”); MISS. COURT-ANNEXED MEDIATION RULES FOR CIVIL LITIGATION XV, *available at* <http://www.mssc.state.ms.us/rules/AllRulesText.asp?IDNum=37> (June 27, 2002) (noting that “self-determination is the fundamental principle of mediation” and that parties should have the ability to enter into “voluntary, uncoerced agreement[s]”); N.C. Prof. Conduct Mediators Rule V (2005) (requiring a mediator to “respect and encourage [party] self-determination”); OKLA. STAT. tit. 12, ch. 37, App. A, Code of Professional Conduct for Mediators, Preamble (2005) (specifying that “disputants have a right to negotiate and attempt to determine the outcomes of their own conflicts”); TENN. SUP. CT. RULE 31, App. A, § 5(a) (2005) (“Decisions are to be made voluntarily by the parties themselves.”); TEX. CIV. PRAC. & REM. CODE § 154.023(b) (Vernon 2005) (“A mediator may not impose his own judgment on the issues for that of the parties.”); Utah Code of Ethics for ADR Providers, URCADR Rule 104, Canon VIII, Process and Terms of Settlement in Mediation (2005) (explaining Utah’s ethical rule that party “self-determination is a fundamental principle of mediation” and that the mediator’s role is to assist the parties “to reach an informed and voluntary agreement”); Wisconsin Ethical Guidelines for the Practice of Mediation, Preamble, *available at* <http://www.wamediators.org/pubs/ethicalguidelines.html> (April 4, 1997) (“Mediation is based on principles of fairness, privacy and self-determination of the parties.”).

⁵² See *infra* Part II.C.1 and Appendix A.

⁵³ See e.g., Iowa Ass’n for Dispute Resolution Model Standards of Conduct for Mediators, Standard II and Comments, *available at* <http://www.iowaadr.org/Standards.htm> (Dec. 5, 2002) (emphasizing that party self-

that the participants have made informed decisions.⁵⁴ Other state Standards emphasize “fairness” without explaining whether it applies to procedure, substance or both.⁵⁵ Still other state Standards emphasize either some sort of substantive result⁵⁶ or emphasize procedural fairness within the context of a quality process⁵⁷ and party self-determination.⁵⁸ The purpose of this Part II.C is to delve into these and related provisions regarding mediator impartiality and fairness.

1. Mediator Impartiality

The contours of mediator impartiality are not always easy to discern. Some Standards provide good definitions of what is considered impartial. Many Standards include definitions of impartiality similar to the Model Standards. For example, the Minnesota Code of Ethics for Neutrals and the Montana Mediation Association Standards of Practice Ethical Guidelines for Full Members both define impartiality as “freedom from favoritism or bias either by word or

determination is a fundamental principle and stating that “[a] mediator cannot personally ensure that each party has made a fully informed choice to reach a particular agreement.”); Rules Adopted by the Kansas Supreme Court Relating to Mediation, Rule 903(a), (b) & (f) and Comments, *available at* <http://www.kscourts.org/ctruls/adrruls.htm> (July 1, 1996) (a mediator shall commit to procedural fairness and where appropriate shall recommend outside professional advice, but “cannot personally ensure that each party has made a fully informed choice to reach a particular agreement.”); Maryland Standards of Conduct for Mediators, Arbitrators and Other ADR Practitioners, Standards I, VI and Comments, *available at* <http://www.courts.state.md.us/macro/standardsfinal.pdf> (last visited Jan. 5, 2006) (stating that a “mediator cannot personally ensure that each party has made a fully informed choice to reach a particular agreement” and because of the importance of party self-determination, a mediator may not provide professional advice and requiring a mediator to recommend outside professional advice); MINN. GEN. RULES OF PRAC. FOR THE DIST. CTS. 114 Appendix, Mediation Rule I, Comment 2 (Aug. 27, 1997) (“A mediator cannot personally ensure that each party has made a fully informed choice to reach a particular agreement”); MISS. COURT-ANNEXED MEDIATION RULES FOR CIVIL LITIGATION XV.A, Comments, *available at* <http://www.mssc.state.ms.us/rules/AllRulesText.asp?IDNum=37> (June 27, 2002); New Jersey Standards of Conduct for Mediators in Court-Connected Programs, Standard I and Comment C, *available at* <http://www.judiciary.state.nj.us/notices/n000216a.htm> (last visited Feb. 3, 2006) (stating that party self-determination is the “fundamental principle” of mediation, requiring the parties to enter into a “voluntary agreement without coercion,” and explaining that the mediator cannot ensure a fully informed decision).

⁵⁴ See *supra* note 53.

⁵⁵ See *infra* Part II.C.2.a.

⁵⁶ See *infra* Part II.C.2.c.

⁵⁷ See *infra* Part II.C.2.b.

⁵⁸ See e.g., Wisconsin Ethical Guidelines for the Practice of Mediation, Preamble and 1.3, *available at* <http://www.wamediators.org/pubs/ethicalguidelines.html> (April 4, 1997) (noting that mediators are to respect party self-determination and at the same time “help parties understand the consequences of those decisions in a context of procedural fairness.”).

action, and a commitment to serve all parties as opposed to a single party.”⁵⁹ Massachusetts simply defines “impartiality” as “freedom from favoritism and bias in conduct as well as appearance.”⁶⁰ Other similar definitions are found in Standards for the states of Alabama, Arkansas, Hawaii, Nebraska, New Mexico, North Carolina, Tennessee and Texas.⁶¹ The New Jersey Standards of Conduct for Mediators in Court-Connected Programs explains its impartiality provision in part by requiring a mediator to “avoid any conduct that gives the appearance of either favoring or disfavoring any party.”⁶² Another similar definition can be found in Utah, which focuses on both a mediator’s partiality and appearance of partiality.⁶³

⁵⁹ MINN. GEN. RULES OF PRAC. FOR THE DIST. CTS. 114 Appendix, Code of Ethics, Rule I, Comment 1 (2006); Mont. Mediation Ass’n Standards of Practice: Ethical Guidelines for Full Members, Responsibilities to the Parties, #1 (Sept. 10, 1998), *available at* http://www.mtmediation.org/images/Assoc_Full_App_with_ethics_and_qual.pdf.

⁶⁰ ALM SUP. JUD. CT. RULE 1:18, § 9(b) (2004).

⁶¹ Alabama Code of Ethics for Mediators, Standard 5(a), *available at* http://alabamaadr.org/flashSite/Standards/al_code_ethics.html (Mar. 1, 1996) (defining impartiality as “freedom from favoritism or bias in work, action, and appearance. Impartiality implies a commitment to aid all parties, as opposed to one or more specific parties, in moving toward agreement.”); Arkansas Alternative Dispute Resolution Commission Requirements for the Conduct of Mediation and Mediators, Standard 5.A, *available at* http://courts.state.ar.us/pdf/0516_conduct.pdf (April 13, 2001) (defining impartiality as “freedom from favoritism or bias in work, action, and appearance. Impartiality implies a commitment to aid all parties, as opposed to one or more specific parties, in moving toward agreement.”); Guidelines for Hawaii Mediators, Guideline III.1., attached to *In the Matter of the Guidelines for Hawaii Mediators* (July 11, 2002) (defining impartiality as “freedom from favoritism or bias in work, action, and appearance. Impartiality implies a commitment to aid all parties, as opposed to one or more specific parties, in moving toward agreement.”); Nebraska Office of Dispute Resolution, Manual of Standards and Ethics for Center Mediators, Directors and Staff III.A.1 (Rev. June, 2001) (“A mediator should strive to maintain impartiality towards all parties and be free of favoritism or bias in appearance, word, and action. A mediator is committed to aiding all parties, as opposed to a single party, in exploring the possibilities for resolution.”); New Mexico Mediation Ass’n Code of Ethical Conduct, #4.B (1995), *available at* <http://www.lobo.net/~ergo/mediate/nmma000.htm> (“Impartiality, in word or action means: i) freedom from bias or favoritism. ii) A commitment to aid all parties equally in reaching a mutually satisfactory agreement. iii) That a mediator will not play an adversarial role in the process of dispute resolution.”); N.C. Prof. Conduct Mediators Rule II.A. (2005) (defining impartiality as the “absence of prejudice or bias in word and action. . . . [and] a commitment to aid all parties, as opposed to a single party, in exploring the possibilities for resolution”); TENN. SUP. CT. RULE 31, App. A, § 6(a) (2005) (“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 conducting Rule 31 ADR processes.”); Ethical Guidelines for Mediators, Comment to Guideline 9, *available at* <http://www.texasadr.org/ethicalguidelines.cfm> (last visited Jan. 12, 2006) (“Impartiality means freedom from favoritism or bias in word, action, and appearance; it implies a commitment to aid all parties in reaching a settlement.”).

⁶² New Jersey Standards of Conduct for Mediators in Court-Connected Programs, Standard II, Comment A, *available at* <http://www.judiciary.state.nj.us/notices/n000216a.htm> (last visited Feb. 3, 2006).

⁶³ Utah Code of Ethics for ADR Providers, URCADR Rule 104, Canon I, ADR Providers Should Uphold the Integrity and Fairness of the ADR Program (2005). Utah defines “impartial” as “free from favoritism or bias in word, action or appearance, and includes a commitment to assist all participants as opposed to any one individual.”

In conjunction with impartiality provisions, a mediator in Alabama, Hawaii and Tennessee may raise questions to enable the parties to consider the “fairness, equity, and feasibility” of proposed settlement options, and may withdraw from the mediation if she believes she can no longer maintain impartiality.⁶⁴ Texas and Utah also require a mediator to withdraw either based on her personal opinion regarding impartiality or simply at the request of one party.⁶⁵

Some Standards are rather oblique in defining the concept of impartiality. Maryland, Mississippi, Michigan, South Carolina and Virginia fall into this category. Virginia simply requires a mediator “to remain impartial and free from conflicts of interest . . .” without offering any further explanation.⁶⁶ Mississippi defines impartiality by requiring a mediator to be “impartial and evenhanded.”⁶⁷ Maryland, Michigan and South Carolina track similar language to the UMA; Michigan’s impartiality standard states:

A mediator shall conduct the mediation in an impartial manner. The concept of mediator impartiality is central to the mediation process. A mediator shall mediate only those matters in which it is possible to remain impartial and evenhanded. If at any time the mediator is unable to conduct the process in an impartial manner, the mediator is obligated to withdraw.⁶⁸

Id. at Canon III(a)(1). “ADR providers should guard against bias or partiality based on the participants’ personal characteristics, background or performance at the proceeding.” *Id.* at Canon III(a)(2).

⁶⁴ Alabama Code of Ethics for Mediators, Standard 5(a), *available at* http://alabamaadr.org/flashSite/Standards/al_code_ethics.html (Mar. 1, 1996); Arkansas Alternative Dispute Resolution Commission Requirements for the Conduct of Mediation and Mediators, Standard 5.A, *available at* http://courts.state.ar.us/pdf/0516_conduct.pdf (April 13, 2001); Guidelines for Hawaii Mediators, Guideline III.1, attached to *In the Matter of the Guidelines for Hawaii Mediators* (July 11, 2002); TENN. SUP. CT. RULE 31, App. A, § 6(a)(1) & (2) (2005).

⁶⁵ Ethical Guidelines for Mediators, Comment to Guideline 9, *available at* <http://www.texasadr.org/ethicalguidelines.cfm> (last visited Jan. 12, 2006); Utah Code of Ethics for ADR Providers, URCADR Rule 104, Canon II(e) & (f) Disclosure and Disqualification (2005).

⁶⁶ VA. CODE ANN. § 8.01-581.24 (2004).

⁶⁷ MISS. COURT-ANNEXED MEDIATION RULES FOR CIVIL LITIGATION XV.B, *available at* <http://www.mssc.state.ms.us/rules/AllRulesText.asp?IDNum=37> (June 27, 2002). Utah also requires a mediator to conduct proceedings in an “evenhanded manner,” but is much more specific than Mississippi. Utah Code of Ethics for ADR Providers, Rule 104, Canon III(a) ADR Providers Should Conduct the Proceedings Fairly and Diligently (2005). Utah goes on to require a mediator to “treat all parties with equality and fairness at all stages of the proceedings,” *id.*, and then specifically defines “impartial.” *Id.* at Canon III(a)(1).

⁶⁸ Mich. Sup. Ct. Standards of Conduct for Mediators, Standard 3, (Jan. 4, 2001), *available at* <http://www.courts.michigan.gov/scao/resources/standards/odr/conduct.pdf>; *see* Maryland Standards of Conduct for

Some states have the vaguest standards of impartiality by merely requiring a mediator to maintain impartiality. For example, Oklahoma requires a mediator to “maintain impartiality at all times.”⁶⁹ Other portions of Oklahoma’s Code of Professional Conduct for Mediators discuss potential conflicts of interest, biases and prejudices.⁷⁰ The Wisconsin Association of Mediators’ guidelines require mediators to “approach the mediation process in an impartial manner. If at any time . . . [mediators] are unable to do so, . . . [they] withdraw from the mediation process.”⁷¹

From the conflict of interest perspective, Nebraska focuses on financial or personal interests and an existing or past relationship and whether a “reasonable individual” believes that such information may affect a mediator’s impartiality.⁷² Similarly, Indiana merely states that a mediator “shall be impartial” and indicates that a mediator may not have an interest in the outcome of the dispute or have any type of personal or professional relationship with a participant.⁷³ Without defining “impartiality,” Colorado and Idaho require mediators to disclose prior or existing affiliations with any party and preclude any financial or other interest in the outcome of the mediation.⁷⁴

Mediators, Arbitrators and Other ADR Practitioners, Standards II and Comments, *available at* <http://www.courts.state.md.us/macro/standardsfinal.pdf> (last visited Jan. 5, 2006) (“The concept of impartiality is central to all ADR processes. Neutrals shall handle only those matters in which they can remain impartial. If at any time neutrals are unable to conduct the process in an impartial manner, they are obligated to withdraw.”); S.C. RULES, CIR. CT. ADR App. B, Standards of Conduct for Mediators, Standard II, *at* <http://www.judicial.state.sc.us/courtReg/arbmedb.html> (last visited Jan. 12, 2006) (“The concept of mediator impartiality is central to the mediation process. A mediator shall mediate only those matters in which she or he can remain impartial and evenhanded. If at any time the mediator is unable to conduct the process in an impartial manner, the mediator is obligated to withdraw.”).

⁶⁹ OKLA. STAT. tit. 12, ch. 37, App. A, Code of Professional Conduct for Mediators, B.2.c (2005).

⁷⁰ *Id.* at B.2.b.

⁷¹ Wisconsin Ethical Guidelines for the Practice of Mediation, 4.1, *available at* <http://www.wamediators.org/pubs/ethicalguidelines.html> (April 4, 1997).

⁷² NEB. REV. STAT. ANN. § 25-2938(a)(1) (Michie 2005).

⁷³ IND. RULES OF CT., RULES FOR ADR 7.4(C) & (E) (2006).

⁷⁴ Colorado Model Standards of Conduct for Mediators II, *available at* <http://dola.state.co.us/SmartGrowth/ADRMediators/documents/modelstandards.pdf> (last visited Jan. 4, 2006); Idaho Mediation Ass’n Standards of Prac. for Idaho Mediators III.1 & 4, *available at* <http://www.idahomediation.org/sop.pdf> (last visited Jan. 4, 2006).

As can be seen from this sampling of Standards, principles of impartiality are not standardized. Some definitions relate to mediator conduct while others relate more to conflict of interest concerns. Many of the definitions of impartiality are insignificant because they seek to define themselves by using repetitive terminology. Such an approach is not helpful to mediators because it is too easy for them to interpret the meaning of impartiality in very different ways based on personal custom and tradition. As a result, even though most state standards include provisions relating to impartiality, no standardized form exists. The lack of clarity in many of the impartiality provisions will lead to a lack of standardized use for mediators within their respective states, which could undermine the integrity and credibility of the mediation practice.

2. Quality or Fairness of Mediations

Mediation fairness, according to the state Standards presented in Appendix A, seems to be aligned with concepts of substantive fairness in terms of a final outcome, procedural fairness in the context of a quality process, and the vague reference to fairness without much in the way of explanation. Two other provisions relate to fairness.

First, a mediator may have a duty to promote a balanced process. Some state Standards appear to relate a balanced process to procedural issues while others broach the subject within the context of the ultimate result. Many Standards equate a balanced process to party self-determination, pointing out that if the parties cannot understand what is being communicated in such a way as to make informed decisions, they cannot properly exercise their rights to determine the final outcome.

This notion leads to the second provision – a mediator’s duty to promote informed decision making. If the process or the outcome is to be fair, according to some Standards, then

the parties must be in a position to understand and be informed about the result to which they are agreeing.

Appendix A to this article reflects mediation fairness in the following categories:

- Promote Fairness
- Promote Procedural Fairness
- Ensure Fair Result
- Promote Informed Decisions
- Promote Balanced Process

One may easily compartmentalize these categories into separate columns on a chart. It is not as easy to sort specific Standards into each category; therefore, many footnotes are included in Appendix A to help clarify the categorization process. The footnotes reference specific language that was analyzed for purposes of each category. The following discussion addresses each category separately and acknowledges that many categories overlap each other due to specific wording of individual Standards.

a. Fairness

Several state Standards refer to fairness in ways that are difficult to catalog. These provisions, therefore, are simply referred to under a general category of promoting fairness, without specifying whether the fairness relates to substance or procedure.

For example, the introduction and scope of the Alabama, Arkansas and Hawaii Standards refer to core values of mediation and specifically state that mediation emphasizes, among other principles, “fairness.” These Standards fail to explain whether fairness relates to procedure or

substance or both,⁷⁵ although Arkansas relates fairness to the merits of the parties' issues⁷⁶ and Hawaii refers to fairness within the context of information gathering. "A [Hawaii] mediator has a responsibility to promote fairness in mediation through access to information. Minimally, the mediator should encourage (a) the full disclosure of information between participants and (b) the seeking of adequate information and advice outside the mediation process."⁷⁷

Additional examples illustrate the variations with which the generic terms "fair" or "fairness" are used. More detailed explanations are included in the footnotes to Appendix A.

- "Mediation is based on principles of fairness"⁷⁸
- Mediation "emphasizes . . . Fairness;" "Prohibition of Coercion. A mediator shall not coerce or unfairly influence a party into entering into a settlement agreement."⁷⁹
- Mediation "emphasizes: . . . (2.) Fairness and the merits of the issues as defined by the parties. . . ."⁸⁰
- The title for a Nebraska Standard is "Impartiality, Neutrality, and Fairness" and requires a mediator to be impartial and fair.⁸¹

⁷⁵ Alabama Code of Ethics for Mediators, II(d), *available at* http://alabamaadr.org/flashSite/Standards/al_code_ethics.html (Mar. 1, 1996); Guidelines for Hawaii Mediators, Preamble and Background, attached to *In the Matter of the Guidelines for Hawaii Mediators* (July 11, 2002), *available at* http://www.courts.state.us/page_server/Services/AlternativeDispute/Standards/74F59E516BBAE08CEBC3B48770.html.

⁷⁶ Arkansas Alternative Dispute Resolution Commission Requirements for the Conduct of Mediation and Mediators, Scope, II.D, *available at* http://courts.state.ar.us/pdf/0516_conduct.pdf (April 13, 2001) (recognizing that mediation should emphasize "(2.) [f]airness and the merits of the issues as defined by the parties").

⁷⁷ Guidelines for Hawaii Mediators, Guideline VIII.1, attached to *In the Matter of the Guidelines for Hawaii Mediators* (July 11, 2002) *available at* http://www.courts.state.us/page_server/Services/AlternativeDispute/Standards/74F59E516BBAE08CEBC3B48770.html.

⁷⁸ Ethical Guidelines for the Practice of Mediation of the Wisconsin Ass'n of Mediators, Preamble, *available at* <http://www.wamediators.org/pubs/ethicalguidelines.html> (Apr. 4, 1997).

⁷⁹ Alabama Code of Ethics for Mediators II(d), *available at* http://alabamaadr.org/flashSite/Standards/al_code_ethics.html (June 6, 1997).

⁸⁰ Arkansas ADR Comm'n Requirements for the Conduct of Mediation and Mediators II.D, *available at* http://courts.state.ar.us/pdf/0516_conduct.pdf (Apr. 4, 2001).

- “Mediation is based on concepts of communication, negotiation, facilitation, and problem-solving that emphasize: . . . (c) fairness. . . .”⁸²
- “The mediator should conduct the mediation fairly and diligently.”⁸³
- The dispute resolution proceeding “emphasize[s] . . . fairness”⁸⁴ “A Neutral shall maintain impartiality while raising questions for the parties to consider as to the reality, fairness, equity, and feasibility of proposed options for settlement.”⁸⁵
- “Neutrals must act fairly in dealing with the parties . . . and be certain that the parties are informed of the process in which they are involved.”⁸⁶
- The mediator may discontinue the mediation if she believes “the integrity of the process has been compromised by . . . gross unfairness resulting from non-disclosure or fraud by a participant. . . .”⁸⁷

The above examples illustrate the context within which the terms “fair” and “fairness” are used. Each situation allows mediator discretion to determine the meaning of fairness. Such discretion is particularly visible in provisions cautioning a mediator to act fairly or conduct the mediation in a fair manner. Some Standards expand on the concept of fairness by referring to coercive behavior or the availability of information. Nevertheless, none of the provisions provides specific guidance to help a mediator determine what she should deem to be fair.

⁸¹ The Nebraska Office of Dispute Resolution has a Manual of Standards and Ethics for Center Mediators, Directors and Staff, Standard III.A (June 2001).

⁸² FLORIDA RULES FOR CERTIFIED AND COURT-APPOINTED MEDIATORS 10.230, *available at* http://flcourts.org/gen_public/adr/index.shtml (2000).

⁸³ Colorado Model Standards of Conduct for Mediators V.A, *available at* <http://www.dola.state.co.us/SmartGrowth/ADRMediators/> (1999).

⁸⁴ Standards of Professional Conduct for Rule 31 Neutrals, TENN. SUP. CT. RULE 31, App. A, § 1(c) (2005).

⁸⁵ *Id.* § 6(a)(1).

⁸⁶ Montana Mediation Ass’n Standards of Practice, Ethical Guidelines for Full Members, General Responsibilities, *available at* http://www.mtmediation.org/images/Assoc_Full_App_with_ethics_and_qual.pdf (Sept. 10, 1998).

⁸⁷ N.C. Standards of Prof. Conduct for Superior Court Mediators, N.C. Prof. Conduct Mediators Rule V.D (2005).

b. Procedural Fairness

A prevailing standard in many states emphasizes the quality of the mediation process.

Many state Standards tract language similar to Michigan as they seek to expound on procedural fairness:

Quality of the Process. A mediator shall conduct the mediation fairly and diligently. A mediator shall work to ensure a quality process and to encourage mutual respect among the parties. A quality process requires a commitment by the mediator to *diligence and procedural fairness*. There should be adequate opportunity for each party in the mediation to participate in the discussions.⁸⁸

Utah strives to preserve “the integrity and fairness of the process”⁸⁹ In particular, mediators “should conduct themselves in a manner that is fair to all parties and their counsel; they should not be swayed by outside pressure, public clamor, fear of criticism, or self interest.”⁹⁰ Colorado has similar provisions.⁹¹

Wisconsin emphasizes the importance of party self-determination by allowing mediators to ensure that parties understand the consequences of their decisions within the context of procedural fairness; yet Wisconsin fails to explain what “procedural fairness” means.⁹² Like

⁸⁸ Standards of Conduct for Mediators, (7), *available at* <http://www.courts.michigan.gov/scao/dispute/odr.htm> (Jan. 4, 2001) (emphasis added); *see* Iowa Ass’n for Dispute Resolution Model Standards of Conduct for Mediators, Standard III, *available at* <http://www.iowaadr.org/Standards.htm> (Dec. 5, 2002); Maryland Standards of Conduct for Mediators, Arbitrators and Other ADR Practitioners VI, *available at* http://www.courts.state.md.us/macro/rules_standards.html (last visited Jan. 5, 2006); MISS. SUP. COURT-ANNEXED MEDIATION RULES FOR CIVIL LITIGATION XV.F, *available at* <http://www.mssc.state.ms.us/rules/Body.asp> (June 27, 2002); RULES OF THE SUPERIOR CT. OF THE STATE OF NEW HAMPSHIRE 170(J), Guidelines for Rule 170 Mediators (J)(6), *available at* <http://www.nh.gov/judiciary/adrp/index.htm> (last visited Jan. 11, 2006); New Jersey Standards of Conduct for Mediators in Court-Connected Programs VI, *available at* <http://www.judiciary.state.nj.us/notices/n000216a.htm> (last visited Feb. 3, 2006).

⁸⁹ UTAH RULES OF COURT-ANNEXED ALTERNATIVE DISPUTE RESOLUTION 104, Code of Ethics for ADR Providers, Canon I(a) (2005) (“ADR Providers Should Uphold the Integrity and Fairness of the ADR Program.”).

⁹⁰ *Id.* at Canon I(d).

⁹¹ Colorado Model Standards of Conduct for Mediators V, *available at* <http://dola.state.co.us/SmartGrowth/ADRMediators/Documents/modelstandards.pdf> (1999) (requiring a mediator to conduct the mediation “fairly and diligently” and assist the parties to evaluate the best methods of resolving their dispute).

⁹² Ethical Guidelines for the Practice of Mediation of the Wisconsin Ass’n of Mediators 1.3, *available at* <http://www.wamediators.org/pubs/ethicalguidelines.html> (April 4, 1997) (stating that mediators “respect the right of

Wisconsin, many Standards do not define what is meant by “procedural fairness.” The Michigan, New Jersey and South Carolina Standards, however, imply that procedural fairness includes an adequate opportunity for the parties to participate in the mediation and decide when to either settle or terminate the mediation.⁹³ The Minnesota Supreme Court, in its Code of Ethics for Neutrals, precludes the neutral from knowingly making “false statements of fact or law” and encourages the mediator to expedite the mediation process.⁹⁴

c. Fair Result

Some Standards do not specifically refer to substantive fairness, yet the terminology hints at the mediator’s ability to influence or even control the outcome of the mediation. For example, Indiana mediators may terminate a mediation when a “reasonable agreement is unlikely,” due in part to prejudice or an unwillingness or inability to participate meaningfully in the mediation.⁹⁵ Montana mediators have a duty to ensure that the parties “consider the terms of a settlement” and if concerned, must discuss these concerns with the parties.⁹⁶

parties to make informed decisions. We help parties understand the consequences of those decisions in a context of procedural fairness.”).

⁹³ Michigan Sup. Ct. Standards of Conduct for Mediators 7, *available at* <http://www.courts.michigan.gov/scao/dispute/odr.htm> (Jan. 4, 2001); New Jersey Standards of Conduct for Mediators in Court-Connected Programs VI, Comment C, *available at* <http://www.judiciary.state.nj.us/notices/n000216a.htm> (last visited Feb. 3, 2006); Standards of Conduct for Mediators, S.C. RULES, CIR. CT. ADR App. B (2004) [Applicable to Charleston, Florence, Horry, Lexington, and Richland Counties Only], Standard VI, *available at* <http://www.judicial.state.sc.us/courtReg/arbmedb.html> (last visited Feb. 3, 2006).

⁹⁴ MINN. GEN. RULES OF PRAC. FOR THE DIST. CTS. 114 Appendix, Code of Ethics V, *available at* <http://www.courts.state.mn.us/rules/general/grtitleII.htm> (Aug. 27, 1997) (“A neutral shall not knowingly make false statements of fact or law. The neutral shall exert every reasonable effort to expedite the process including prompt issuance of written reports, awards, or agreements.”).

⁹⁵ IND. RULES OF CT., RULES FOR ADR 2.7(D) (2006) (“The mediator shall terminate mediation whenever the mediator believes that continuation of the process would harm or prejudice one or more of the parties or the children or whenever the ability or willingness of any party to participate meaningfully in mediation is so lacking that a reasonable agreement is unlikely.”).

⁹⁶ Montana Mediation Ass’n Standards of Practice: Ethical Guidelines for Full Members 6, *available at* http://www.mtmediation.org/images/Assoc_Full_App_with_ethics_and_qual.pdf (Sept. 10, 1998) (“The dispute resolution process belongs to the parties. The neutral has no vested interest in the terms of settlement, but must be satisfied that agreements in which he or she has participated will not impugn the integrity of the process. The neutral has a responsibility to see that the parties consider the terms of a settlement. If the neutral is concerned

Massachusetts permits a mediator to question unrepresented parties whether they have enough information to “reach a fair and fully informed settlement,” while “maintaining impartiality.”⁹⁷ On its face, this provision seems consistent with other Massachusetts provisions regarding impartiality, yet the implication of such inquiries appears to be problematic. These provisions seem to allow the mediator to interject her personal opinions and values to such an extent as to control more than just process issues.

Notably, the Indiana, Massachusetts and Montana Standards do not specifically mention “self-determination,” although they do provide for party autonomy,⁹⁸ a direct contradiction to the mediator’s involvement in a fair result. Furthermore, the provisions discussed herein allow a mediator easily to exceed her duties of neutrality and impartiality as she engages in a directive approach to ensure the vague notion of dealing fairly with mediation participants.

Texas, Idaho and Tennessee allow a mediator to terminate a mediation if she believes a party “is unwilling or unable to participate meaningfully in the mediation process”⁹⁹ and Texas, Idaho, Tennessee and Virginia preclude a mediator from compelling or coercing the parties into a settlement.¹⁰⁰ Additionally, Idaho authorizes the mediator to promote party understanding to

about the possible consequences of a proposed agreement, and the needs of the parties dictate, the neutral must inform the parties of that concern. In adhering to this standard, the neutral may find it advisable to educate the parties, to refer one or more parties for specialized advice, or to withdraw”).

⁹⁷ ALM SUP. JUD. CT. RULE 1:18, § 9(c)(vii) (2005).

⁹⁸ Rather than specifically refer to “party self-determination,” Indiana standards preclude the mediator from making a substantive decision for a party, IND. RULES OF CT., RULES FOR ADR 7.5(C) (2006), and Montana standards identify the dispute resolution process as one that belongs to the parties. Montana Mediation Ass’n Standards of Practice: Ethical Guidelines for Full Members 6, *available at* http://www.mtmediation.org/images/Assoc_Full_App_with_ethics_and_qual.pdf (Sept. 10, 1998).

⁹⁹ Ethical Guidelines for Mediators of the State Bar of Texas 13, *available at* <http://www.texasadr.org/ethicalguidelines.cfm> (last visited Jan. 12, 2006); *see* Idaho Mediation Ass’n Standards of Practice for Idaho Mediators IV.2, *available at* <http://www.idahomediation.org/sop.pdf> (last visited Jan. 4, 2006) (“If the mediator determines that the parties are unable or unwilling to participate in meaningful discussion or if they reach impasse the mediator should terminate the process.”); Standards of Professional Conduct for Rule 31 Neutrals, TENN. SUP. CT. RULE 31, App. A, § 4(b) (2005) (“A Neutral shall not unnecessarily or inappropriately prolong a dispute resolution session if it becomes apparent that the case is unsuitable for dispute resolution or if one or more of the parties is unwilling or unable to participate in the dispute resolution process in a meaningful manner.”).

¹⁰⁰ TEX. CIV. PRAC. & REM. CODE § 154.053(a) (Vernon 2005); Idaho Mediation Ass’n Standards of Practice for Idaho Mediators III.5, *available at* <http://www.idahomediation.org/sop.pdf> (last visited Jan. 4, 2006); Standards of

reach an informed and voluntary settlement.¹⁰¹ Although the Idaho Standards do not specify “fairness,” the Preamble specifies that a mediator should raise questions for the parties to consider, “including questions of fairness and feasibility of settlement options.”¹⁰² Without referring to “fairness” in any way, Oklahoma emphasizes the need for the parties to make their own decisions regarding settlement without being forced to do so by the mediator, yet allows a mediator to suspend or terminate a mediation if she believes a party is unable or unwilling to participate meaningfully, when the mediation appears to not be productive or when a party appears to be mentally impaired.¹⁰³ Some Standards, such as Colorado, allow the mediator to terminate the mediation when she believes an agreement violates the law.¹⁰⁴

Other state Standards are more explicit regarding a fair result, which is interpreted as substantive fairness. For example, a mediator may indicate non-concurrence with a decision she “finds inherently unfair,”¹⁰⁵ refuse to draft or sign an agreement “which seems fundamentally unfair to one party,”¹⁰⁶ or withdraw if she deems a proposed resolution to be unconscionable.¹⁰⁷ A mediator may not compel parties to settle in the absence of a “fair and reasonable settlement.”¹⁰⁸ Some state Standards authorize mediators, within the bounds of impartiality, “to raise questions for the parties to consider as to whether they have the information needed to

Professional Conduct for Rule 31 Neutrals, TENN. SUP. CT. RULE 31, App. A, § 5(b) (2005); VA. CODE ANN. § 8.01-581.24 (2005).

¹⁰¹ Idaho Mediation Ass’n Standards of Practice for Idaho Mediators III.5, *available at* <http://www.idahomediation.org/sop.pdf> (last visited Jan. 4, 2006).

¹⁰² *Id.* at Preamble.

¹⁰³ Code of Professional Conduct for Mediators, OKLA. STAT. tit. 12, ch. 37, App. A, B.1.d & e (2005).

¹⁰⁴ Colorado Model Standards of Conduct for Mediators V.H, *available at* <http://dola.state.co.us/SmartGrowth/ADRMediators/Documents/modelstandards.pdf> (1999).

¹⁰⁵ MCI Prof’l. Standards of Practice for Mediators IV.A, *available at* <http://www.mediationcouncilofillinois.org/standardspractice.htm> (Apr. 2003).

¹⁰⁶ Ethical Standards for Neutrals IV.A, attached as Appendix C to the Alternative Dispute Resolution Rules, *available at* http://www.godr.org/ethics_info.html (last amended Nov. 29, 2005).

¹⁰⁷ IND. RULES OF CT., RULES FOR ADR 7.5(B), *available at* <http://www.in.gov/judiciary/rules/adr> (2006).

¹⁰⁸ W.V. TRIAL CT. RULE 25.11, *available at* <http://www.state.wv.us/wvsca/rules/ctrules.htm> (last visited Jan. 18, 2006).

reach a fair and fully informed settlement of the case.”¹⁰⁹ California is the only state to specify that “[a] mediator is not obligated to ensure the substantive fairness of an agreement. . . .”¹¹⁰

d. Informed Decision making

Within the context of an informed decision, several states seem to mirror California’s cautionary approach of mediator responsibility for substantive fairness. Eight state Standards specifically caution that a mediator cannot ensure informed decisions.¹¹¹ The following provision illustrates typical language:

A mediator cannot personally ensure that each party has made a fully informed choice to reach a particular agreement, but a mediator should make the parties aware of the importance of consulting lawyers and other professionals, where appropriate, to help them make informed decisions and review contracts of agreements.¹¹²

Over half of the states that have Standards, however, advocate that the mediator promote informed decisions. Some provisions are simple, such as promoting an “informed and voluntary settlement.”¹¹³ Others are more informative, such as: “The neutral shall make every reasonable effort to ensure that each party to the dispute resolution process (a) understands the nature and character of the process, and (b) in consensual processes, understands and voluntarily consents to any agreement reached in the process.”¹¹⁴ Georgia has a particularly helpful standard: “Parties cannot bargain effectively unless they have sufficient information. Informed consent to an

¹⁰⁹ ALM SUP. JUD. CT. RULE 1:18, § 9(c)(vii) (2005).

¹¹⁰ Rules of Conduct for Mediators in Court-Connected Mediation Programs for Civil Cases, CAL. RULES OF CT. 1620.7(b) (Jan. 1, 2003). Although a mediator is not obligated to ensure fairness, nothing precludes the mediator from doing so.

¹¹¹ See App. A regarding the states of Iowa, Kansas, Maryland, Mississippi, New Hampshire and New York.

¹¹² Maryland Standards of Conduct for Mediators, Arbitrators and Other ADR Practitioners I, Comment M, available at http://www.courts.state.md.us/macro/rules_standards.html (last visited Jan. 5, 2006).

¹¹³ Standards of Professional Conduct for Rule 31 Neutrals, TENN. SUP. CT. RULE 31, App. A § 5(a) (2005). See FLA. RULES FOR CERTIFIED AND COURT-APPOINTED MEDIATORS 10.310(a), available at http://flcourts.org/gen_public/adr/index.shtml (2000); Guidelines for Hawaii Mediators, Guidelines VI.1, attached to *In the Matter of the Guidelines for Hawaii Mediators* (July 11, 2002) (encouraging mediators to assist the parties in “reaching an informed and voluntary settlement”); Idaho Mediation Ass’n Standards of Practice for Idaho Mediators III.5, available at <http://www.idahomediation.org/sop.pdf> (last visited Jan. 4, 2006).

¹¹⁴ ALM SUP. JUD. CT. RULE 1:18, § 9(c) (2005).

agreement implies that parties not only knowingly agree to every term of the agreement but that they have had sufficient information to bargain effectively in reaching that agreement.”¹¹⁵

e. Balanced Process

As previously discussed, many state Standards include provisions referencing the quality of the process and mention a balanced process as part of that principle. Some states such as Alabama, Arkansas and Tennessee require a mediator to “promote a balanced process,” but do not explain what is meant by a balanced process.¹¹⁶ They require a mediator to “encourage a reasonably balanced process” by participating in the mediation in a “non-adversarial manner.”¹¹⁷

Other miscellaneous provisions appear to require a balance of power. Iowa, for example, requires mediators to “make reasonable efforts to prevent manipulation and intimidation by either party.”¹¹⁸ An Iowa mediator also is to “explore” the parties’ abilities to make free and informed consent.¹¹⁹ Similarly, a Maryland mediator is to assess possible coercion by being “aware of power dynamics”; in such a situation the mediator should explore the coercion issue

¹¹⁵ Ethical Standards for Neutrals I.C, attached as Appendix C to the Alternative Dispute Resolution Rules, *available at* http://www.godr.org/ethics_info.html (last amended Nov. 29, 2005).

¹¹⁶ Alabama Code of Ethics for Mediators, Standard 4(d), *available at* http://alabamaadr.org/flashSite/Standards/al_code_ethics.html (Mar. 1, 1996); Arkansas Alternative Dispute Resolution Commission Requirements for the Conduct of Mediation and Mediators, Standard 4.D, *available at* http://courts.state.ar.us/pdf/0516_conduct.pdf (April 13, 2001); Standards of Professional Conduct for Rule 31 Neutrals, TENN. SUP. CT. RULE 31, App. A, § 5(d) (2005).

¹¹⁷ Alabama Code of Ethics for Mediators, Standard 4(d), *available at* http://alabamaadr.org/flashSite/Standards/al_code_ethics.html (Mar. 1, 1996) (“A mediator shall promote a balanced process and shall encourage the parties to participate in the mediation proceedings in a non-adversarial manner.”); Arkansas Alternative Dispute Resolution Commission Requirements for the Conduct of Mediation and Mediators, Standard 4.D, *available at* http://courts.state.ar.us/pdf/0516_conduct.pdf (April 13, 2001) (“A mediator shall encourage a reasonably balanced process and encourage the parties to participate in the mediation proceedings in a non-adversarial manner.”); Standards of Professional Conduct for Rule 31 Neutrals, TENN. SUP. CT. RULE 31, App. A, § 5(d) (2005) (“A Neutral shall promote a balanced process in Mediation and shall encourage the parties to conduct the mediation in a nonadversarial manner.”).

¹¹⁸ Iowa Ass’n for Dispute Resolution Model Standards of Conduct for Mediators I.B, *available at* <http://www.iowaadr.org/Standards.htm> (Dec. 5, 2002).

¹¹⁹ *Id.* at I.C.

privately with the party being coerced or end the mediation when safety is involved.¹²⁰

Tennessee authorizes mediators to postpone or cancel a mediation if a participant has psychological or physical reasons that render him unable to proceed.¹²¹

Several balance of power provisions mentioned above enable mediators to exceed their impartial demeanor. For example, if the mediator is to prevent coercion, does she interject her own biases and personal opinions to make such a determination? If she prevents manipulative and intimidating conduct of one party, does she appear to be advocating for the other? If she is permitted discretion to determine whether a party is psychologically or physically incapacitated, does mediator subjectivity come into question? These types of mediator conduct collide specifically with requirements of impartiality and, in particular, Iowa's ability to "not take sides."¹²² They also appear to collide with provisions ensuring party self-determination.¹²³

North Carolina Standards contain terms that are noticeably contradictory. On the one hand, the North Carolina State Mediation Standards of Practice empower participants with their self-determination, require mediator impartiality and specifically state that a mediator "shall refrain from being directive and judgmental"¹²⁴ On the other hand, North Carolina authorizes a mediator to exercise her own personal discretion to: 1) determine whether a party is

¹²⁰ Maryland Standards of Conduct for Mediators, Arbitrators and Other ADR Practitioners I, Comment M, *available at* http://www.courts.state.md.us/macro/rules_standards.html (last visited Jan. 5, 2006).

¹²¹ Standards of Professional Conduct for Rule 31 Neutrals, TENN. SUP. CT. RULE 31, App. A, § 8(c) (2005).

¹²² Iowa Ass'n for Dispute Resolution Model Standards of Conduct for Mediators III and Comments, *available at* <http://www.iowaadr.org/Standards.htm> (Dec. 5, 2002) (requiring mediator impartiality and precluding the appearance of partiality toward a party); *see* Maryland Standards of Conduct for Mediators, Arbitrators and Other ADR Practitioners II and Comments, *available at* http://www.courts.state.md.us/macro/rules_standards.html (last visited Jan. 5, 2006) (requiring mediator impartiality and precluding the appearance of mediator partiality toward a party).

¹²³ *See, e.g.*, Arkansas Alternative Dispute Resolution Commission Requirements for the Conduct of Mediation and Mediators, Standard 4.A, *available at* http://courts.state.ar.us/pdf/0516_conduct.pdf (April 13, 2001) ("A mediator is to assist the parties in reaching an informed and voluntary agreement. Substantive decisions made during mediation are to be made voluntarily by the parties."); Iowa Ass'n for Dispute Resolution Model Standards of Conduct for Mediators II, *available at* <http://www.iowaadr.org/Standards.htm> (Dec. 5, 2002); Standards of Professional Conduct for Rule 31 Neutrals, TENN. SUP. CT. RULE 31, App. A, § 5 (2005).

¹²⁴ N.C. Standards of Prof. Conduct for Superior Court Mediators, Rule V (2005).

acting under undue influence; 2) determine whether a party can fully comprehend the process, issues or settlement options; and 3) make suggestions or offer questions to the parties.¹²⁵ The most flagrant contradiction to mediator impartiality and party self-determination is the ability of the mediator to ensure a just result. North Carolina requires a mediator to “ensure a balanced discussion” and prevent participants from attempting to intimidate or manipulate others.¹²⁶

North Carolina specifically allows the following:

If, in the mediator’s judgment, the integrity of the process has been compromised by, for example, inability or unwillingness of a party to participate meaningfully, *gross inequality of bargaining power or ability*, *gross unfairness* resulting from non-disclosure or fraud by a participant, or *other circumstance likely to lead to a grossly unjust result*, *the mediator shall inform the parties*. . . .¹²⁷

While North Carolina’s Standards reflect a thoughtful approach to encourage mediator impartiality and party self-determination, the extremely directive approach given to mediators seems to undermine both concepts. A mediator’s ability to determine the meaningful participation of participants and the power balance between parties is highly subjective. A mediator’s beliefs, as compared to the participants’, may be quite different when interpreting what is fair, meaningful or balanced. As written, therefore, the North Carolina Rules contain internally inconsistent provisions.

3. A Current Avenue to Prevent Mediator Partiality

As noted in this Part II.C, most Standards offer advice for mediators to maintain their impartiality and emphasize party self-determination. Provisions that require a mediator to ensure a balanced process, a just or fair result, or a requirement that the parties are fully informed are contradictory to the former without helping to prevent mediator partiality. Only one avenue

¹²⁵ *Id.* at Rule IV.C & D, and Rule V.B.

¹²⁶ *Id.* at Rule VIII.A.

¹²⁷ *Id.* at Rule V.D (emphasis added).

appears to exist under the Standards: essentially an escape route for mediators by requiring or allowing them to withdraw if unable to serve in an impartial manner.¹²⁸ The mediator's ability to escape, however, does not necessarily help the participants.

If the participants are engaged in conduct that a mediator does not condone and for which the mediator withdraws, the participants may engage in the same or similar conduct in a subsequent mediation involving a different mediator. If a mediator is not given an opportunity to address the participants about what she perceives to be inappropriate conduct, the participants are not being helped to correct communication difficulties that might otherwise enhance their chance to resolve a dispute. On the other hand, if the mediator interjects her personal opinions and values as to what she perceives to be inappropriate or unfair, she necessarily violates or is put in a position to violate requirements of neutrality and impartiality or other portions of the ethical Standards.

As a result, many of the Standards seem to create tension, and therefore, enhance problems for mediation participants through the use of inconsistent, contradictory and otherwise vague provisions. It is easier to understand this phenomena by examining the relevant provisions of a single state Standard within a single discourse. That is the purpose of Part II.D.

D. An Analysis of Select State Standards

Several states are at the forefront of the dispute resolution movement or otherwise have extensive mediation standards. For these reasons, this Part II.D focuses specifically on the Standards of California, Florida, Georgia and Illinois. Like Part II.C, the following discussion

¹²⁸ See, e.g., IND. RULES OF CT., RULES FOR ADR 7.4(C) (2006) (requiring a neutral to withdraw if she can no longer be impartial); Circuit Court Alternative Dispute Resolution Rules of the South Carolina Judicial Department, Appendix B, Standards of Conduct for Mediators, Comment to Standard VI, *available at* <http://www.judicial.state.sc.us/courtReg/arbmedb.html> (last visited Feb. 16, 2006) (requiring a mediator to “withdraw from a mediation when incapable of serving or when unable to remain impartial”).

focuses on the portion of the Standards that relate to neutrality, impartiality and fairness of the mediation. By presenting an indepth analysis of individual state Standards, it is easy to see how the provisions of one set of Standards can create tension for mediator neutrality and impartiality or simply include inconsistent and contradictory provisions.

1. California's Ethical Standards for Mediators

California's Ethical Standards for Mediators ("California Standards") were adopted effective January 1, 2003 and apply to court-connected mediation programs for civil cases. These standards are much more inclusive than the Model Standards.

The California Standards recognize that fairness of the process is essential for effective mediations¹²⁹ and specifically requires "procedural fairness." Unlike the Model Standards, the California Standards define "procedural fairness" as a "balanced process" whereby all parties may participate and not be coerced.¹³⁰ A mediator, however, is not required to ensure the substantive fairness of a final agreement.¹³¹ Although these California provisions are more explicit than the Model Standards, their vague terms create chaos with one another.

For example, the prohibition against coercion is not specific to a mediator. As a result, it could mean that in addition to monitoring her own conduct, a mediator must ensure that none of the parties coerces another party. As soon as the mediator engages in that assessment, she begins to advocate for and protect a party. Such conduct undermines the mediator's neutrality and thwarts party self-determination, creating a tension among several of California's provisions.

¹²⁹ Rules of Conduct for Mediators in Court-Connected Mediation Programs for Civil Cases, CAL. RULES OF COURT R. 1620 (2003).

¹³⁰ *Id.* at Rule 1620.7(b).

¹³¹ *Id.*

A California mediator must act impartially toward all parties,¹³² and rely on the principles of party self-determination and voluntary participation.¹³³ Specifically, a mediator must “refrain from coercing any party to make a decision”¹³⁴ That means that a mediator may not coerce a party to continue mediating when he or she wishes to terminate the session, provide an opinion or evaluation over a party’s objection or in a coercive manner, use abusive language and threaten to report a party’s conduct to the court.

A mediator’s conduct is not deemed coercive if she suggests that the parties obtain professional advice.¹³⁵ And, Standard 1620.7(d) allows a mediator to render an opinion or provide information that “he or she is qualified by training or experience to provide.”¹³⁶ Standard 1620.7(d), however, is vague and ambiguous because it limits the information to areas within the mediator’s training or experience without defining the extent to which the training or experience pertains. Essentially, the provision authorizes the mediator to exercise personal discretion to assess her own capabilities.

2. Florida Rules for Certified and Court-Appointed Mediators

The Florida Rules for Certified and Court-Appointed Mediators (“Florida Rules”) became effective in May 1992 and were revised in April 2000.¹³⁷ They define mediation as “a process whereby a neutral and impartial third person acts to encourage and facilitate the resolution of a dispute without prescribing what it should be.”¹³⁸ In furtherance of this definition, the Florida Rules include specific provisions.

¹³² *Id.* at Rule 1620.5.

¹³³ *Id.* at Rule 1620.3.

¹³⁴ *Id.*

¹³⁵ Rules of Conduct for Mediators in Court-Connected Mediation Programs for Civil Cases, CAL. RULES OF COURT R. 1620.3, Advisory Committee Comment (2003).

¹³⁶ *Id.* at Rule 1620.7(d).

¹³⁷ FLA. RULES FOR CERTIFIED AND COURT-APPOINTED MEDIATORS 10.200, Committee Notes (2000).

¹³⁸ *Id.* at Rule 10.210.

For example, a mediator’s impartiality means that he or she will not exhibit “favoritism or bias in word, action, or appearance”; a mediator shall assist all parties rather than any one person.¹³⁹ A mediator is to “facilitate voluntary agreements” so that the parties have the ultimate authority to decide.¹⁴⁰ In particular, the mediation should emphasize, among other things, “self determination, the parties’ needs and interests, and fairness,”¹⁴¹ although “fairness” is not specifically defined.

A mediator should not be coercive.¹⁴² In fact, the Florida Rules specifically state that “[a] mediator shall not coerce or improperly influence any party to make a decision or unwillingly participate in a mediation.”¹⁴³

A mediator may, however, provide professional advice as long as it is “[c]onsistent with standards of impartiality and preserving party self-determination” and the mediator is otherwise qualified by training or experience to provide such information.¹⁴⁴ In this regard, two specific provisions seem to authorize contradictory behavior:

(b) Independent Legal Advice. When a mediator believes a party does not understand or appreciate how an agreement may adversely affect legal rights or obligations, the mediator shall advise the party of the right to seek independent legal counsel.

(c) Personal or Professional Opinion. A mediator shall not offer a personal or professional opinion intended to coerce the parties, decide the dispute, or direct a resolution of any issue. Consistent with standards of impartiality and preserving party self-determination however, a mediator may point out possible outcomes of the case and discuss the merits of a claim or defense. A mediator shall not offer a personal or professional opinion as to how the court in which the case has been filed will resolve the dispute.¹⁴⁵

¹³⁹ *Id.* at Rule 10.330.

¹⁴⁰ *Id.* at Rule 10.220.

¹⁴¹ *Id.* at Rules 10.230 and 10.300 (noting that the “mediator’s business practices should reflect fairness, integrity and impartiality”).

¹⁴² *Id.* at Rule 10.300.

¹⁴³ FLA. RULES FOR CERTIFIED AND COURT-APPOINTED MEDIATORS 10.310 (2000).

¹⁴⁴ *Id.* at Rule 10.370(a).

¹⁴⁵ *Id.* at Rule 10.370(b) and (c).

Rule 10.370(b), which authorizes independent legal advice, authorizes a mediator to exercise her personal judgment to decide whether to advise “*the party*” to seek independent legal counsel.

Rule 10.370(b) is written in the singular, inferring that a mediator need only advise the participant who, in the mediator’s opinion, does not understand a potential agreement or may be adversely affected by it. Such conduct violates a mediator’s neutrality because the mediator may aid one party to the disadvantage of the other. Subparagraph (b), which authorizes a mediator to interject her personal opinion without using such terminology, actually conflicts with Rule 10.370(c), which precludes a mediator from offering “a personal or professional opinion intended to . . . direct a resolution of any issue.”¹⁴⁶

Finally, the Florida Rules appear to reiterate the process of mediation in vague terms by prescribing a “balanced process” between the parties. In that regard, a mediator is to encourage the parties themselves to be “collaborative, non-coercive, and non-adversarial. . . .”¹⁴⁷ The requirement of a balanced process appears to address process rather than substance. Its terms, however, can affect a mediator’s neutrality to the extent that the mediator steps in to protect one party against coercive or adversarial tactics by the other.

3. Georgia Ethical Standards for Mediators

Georgia has one of the most comprehensive sets of dispute resolution authorities found in any state and has created the Georgia Office of Dispute Resolution and the Georgia Commission on Dispute Resolution. The Commission is charged with administering a statewide ADR program and establishing standards of conduct for neutrals.¹⁴⁸ The Georgia state authorities

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at Rule 10.410.

¹⁴⁸ GA. SUP. CT. ALTERNATIVE DISPUTE RESOLUTION RULES II.A.2, *available at* http://www.godr.org/ethics_info.html (last visited Feb. 6, 2006).

include: The Georgia Court-Connected Alternative Dispute Resolution Act,¹⁴⁹ the Alternative Dispute Resolution Rules,¹⁵⁰ the Model Court Mediation Rules,¹⁵¹ the Guidelines for Mediation in Cases Involving Issues of Domestic Violence,¹⁵² and various Ethics and Advisory Opinions.¹⁵³

This discussion will focus on the portion of Appendix C of the Alternative Dispute Resolution Rules that sets forth Ethical Standards for Mediators (“Georgia Ethical Standards”). The Georgia Ethical Standards are divided into five main categories: self-determination, confidentiality, impartiality, fairness and rules of fair practice. These represent the most important principles of mediation. More importantly, the Georgia Ethical Standards recognize many different dilemmas that mediators face as they attempt to fulfill the requirements. Georgia is the only state that includes commentary and examples, followed by recommendations, for each standard. The supplementary information illustrates the competing forces that mediators face and the difficulty in meeting all of them, especially when compliance with one standard might infringe on another.

For example like many other states, Georgia recognizes that party self-determination is paramount to a successful mediation.¹⁵⁴ Consistent with this principle, the mediator is to assure that all parties have the capacity to participate and understand the mediation process.¹⁵⁵ Like some states, Georgia allows the mediator to address a power imbalance between the parties; Georgia goes farther, however, to justify why. The Georgia Ethical Standards explain that if parties are to engage in a self-determining process, they must have the ability to bargain for themselves. If the imbalance of power becomes too skewed, the mediation “should be

¹⁴⁹ available at <http://www.ganet.org/gadr/adract.html> (last visited Feb. 6, 2006).

¹⁵⁰ available at <http://www.ganet.org/gadr/adrules.html> (Sept. 16, 2004).

¹⁵¹ available at http://www.ganet.org/gadr/model_rules.html (Jan. 18, 2005).

¹⁵² available at <http://www.ganet.org/gadr/domviol.html> (April 11, 2005).

¹⁵³ available at http://www.ganet.org/gadr/ethics_info.html (last visited Feb. 6, 2006).

¹⁵⁴ GA. SUP. CT. ALTERNATIVE DISPUTE RESOLUTION RULES, App. C, Ch. 1.A.I and commentary, available at http://www.godr.org/ethics_info.html (amended Nov. 29, 2005).

¹⁵⁵ *Id.* at I.A & B.

terminated.”¹⁵⁶ Nevertheless, the mediator’s authority to manage the balance of power allows the mediator wide discretion and can be construed to infringe on her duties of neutrality and impartiality when attempting to help the weaker of the parties.

Georgia Ethical Standard III recognizes that the mediator’s ability to assist in balancing the power and otherwise assisting a party to present a case may actually conflict with her duty of impartiality, which is required in both word and deed, including the appearance of impartiality.¹⁵⁷

The Standard itself does not define what is meant by “impartiality.” However, the Recommendation to Example 1 offers guidance because it allows the mediator to enhance the effectiveness of party communication by “[h]elping a party to present his or her needs and interests in a way that can be heard by the other side [which] is not a breach of neutrality. . . .”¹⁵⁸

In addition to the general prohibition against impartiality, a mediator is to avoid conflicts of interest, or the appearance thereof, in either the subject matter or relationships with the parties.¹⁵⁹ Finally, a mediator should not coerce parties to reach a settlement.¹⁶⁰

The Georgia Ethical Standards differentiate between the mediator’s ability to provide information and the prohibition against providing advice. Thus, lawyers and other professionals may not offer professional advice. If they believe that “a party is acting without sufficient information,” the mediator may suggest that the party consult an appropriate expert.¹⁶¹ The problem with this provision is that it is written in the singular as it refers to a party. As a result, if a mediator raises the possibility of consulting a professional with one party and not the other,

¹⁵⁶ *Id.* at I.B.

¹⁵⁷ *Id.* at III.

¹⁵⁸ *Id.* at III.A and Recommendation to Example 1.

¹⁵⁹ *Id.* at III.C.

¹⁶⁰ GA. SUP. CT. ALTERNATIVE DISPUTE RESOLUTION RULES, App. C, Ch. 1.A.I.D, *available at* http://www.godr.org/ethics_info.html (amended Nov. 29, 2005).

¹⁶¹ *Id.* at I.E.

the mediator necessarily is violating her duty of neutrality and impartiality by not providing the same suggestion to all parties.

Elsewhere in the Georgia Ethical Standards, mediators are cautioned to handle business dealings in an impartial manner. For example, a mediator should not refer parties to any entity in which she has an economic interest or to a party with whom the mediator intends to receive future business.¹⁶²

The Georgia Ethical Standards described above are fairly consistent with many other state Standards except for Georgia's failure to adequately define "impartiality." Problems begin to surface with Georgia's Ethical Standard IV, Fairness.

The mediator is to assure "fairness of the process . . . characterized by overall fairness and must protect the integrity of the process."¹⁶³ In doing so, the mediator is given great latitude to exercise her own discretion.

For example, if the mediator determines that any proposed settlement is illegal or impossible to execute, she "should not be a party" to that agreement,¹⁶⁴ although no specific guidance is provided to instruct the mediator how to respond. The mediator is to "alert" the parties when a proposed agreement may affect outside parties. A disconcerting provision is as follows: "A mediator may refuse to draft or sign an agreement which seems fundamentally unfair to one party." Although this latter provision appears to be consistent with the provision allowing the mediator to attempt to balance the power between the parties, it nevertheless destroys the concepts of neutrality and impartiality and necessarily interjects the mediator's personal opinions, biases and prejudices into the process. Furthermore, by allowing the mediator to determine what is fundamentally fair, the Standard appears to go beyond procedural fairness to

¹⁶² *Id.* at V.

¹⁶³ *Id.* at IV.

¹⁶⁴ *Id.* at IV.A.

affect the heart of the agreement, or substantive fairness. Standard IV, therefore, impinges on the party's rights of self-determination and collides with Standard III's requirement of mediator impartiality under the guise of preserving the "integrity of the mediation process."¹⁶⁵

1. Illinois Professional Standards of Practice for Mediators

In 1984, the Mediation Council of Illinois adopted its Professional Standards of Practice for Mediators ("Illinois Standards"). They were revised in April 2003, and include specific provisions regarding a mediator's duties of impartiality and neutrality, mediation fairness and party self-determination. Like many other states, Illinois recognizes that party self-determination "is the fundamental principle of mediation" because participants should "make their own voluntary and informed decisions."¹⁶⁶ As shown in the following provisions, however, Illinois mediators have much latitude to interject their own opinions as they ensure a fair agreement. As a result, the principle of mediator impartiality easily can be eroded in Illinois.

During their initial advice, mediators are to inform parties of the duty to "facilitate informed consent" when entering into a mediated settlement agreement.¹⁶⁷ The beginning of the mediation, before any party may attempt to exert power over others, is a good time for the mediator to discuss the need for informed decision making. If the mediator discusses the topic thoroughly at the outset, then the mediator can maintain credibility and neutrality even when she assists a party during the process because the mediator may simply refer to her instructions given at the outset of the mediation.

The duty of informed consent continues throughout the mediation in that a mediator is to "ensure that clients make informed decisions," have a reasonable understanding of the legal

¹⁶⁵ *Id.* at IV.B.

¹⁶⁶ MCI Prof'l Standards of Practice for Mediators, Part A of Definitions (2003), *available at* <http://www.mediationcouncilofillinois.org/standardspractice.htm>.

¹⁶⁷ *Id.* at Standard III.E.

implications of the decision, and the parties' understanding of the information shows that the negotiation was "balanced."¹⁶⁸ Specifically, the "mediator should attempt to assist each person in understanding the interplay of his or her own emotions with the decision making process. . . ."¹⁶⁹ The ability to ensure this type of understanding enables the mediator to work one-on-one with the participants to such an extent that the mediator may actually take sides and lose her required impartiality or neutrality. This fact is further supported by the provision that allows the mediator to ensure a "balanced dialogue" by defusing "manipulative or intimidating negotiating techniques utilized by either of the parties."¹⁷⁰ As with other state Standards, these types of provisions allow the mediator to assist one party in an effort to ensure a balanced process. In doing so, the mediator necessarily takes one party's side to the disadvantage of the other; the mediator's impartiality is at risk.

Consistent with the notion of an informed decision, mediators are to advise participants to obtain legal counsel,¹⁷¹ but this may be done only before an agreement is reached, and mediators are instructed to provide this advice at the outset of the mediation.¹⁷² This procedure is a good way to preserve mediator neutrality and impartiality.

A mediator is specifically prohibited from providing legal advice.¹⁷³ Interestingly, the provision targets legal rights or responsibilities. Nowhere do the Illinois Standards preclude the mediator from providing other professional advice, except a prohibition against practicing "therapy."¹⁷⁴ The prohibition against providing legal advice also is problematic because it may collide with other provisions requiring a fair result and a balanced dialogue. For example, if a

¹⁶⁸ *Id.* at VI.

¹⁶⁹ *Id.* at VI.B.

¹⁷⁰ *Id.* at VI.C.

¹⁷¹ *Id.* at VI.D.

¹⁷² MCI Prof'l Standards of Practice for Mediators, III.D.4 (2003), *available at* <http://www.mediationcouncilofillinois.org/standardspractice.htm>.

¹⁷³ *Id.* at VI.D.

¹⁷⁴ *Id.* at III.D.3.

mediator is to ensure a fair result, legal advice might be necessary. A thoroughly written Standard might distinguish legal information from legal advice, allowing the former and prohibiting the latter. Then, if the mediator provides legal information at the outset of the mediation,¹⁷⁵ credibility of the process and mediator impartiality may be preserved.

The Illinois Standards discuss a mediator's duty of impartiality. Although the Standards do not define what is meant by impartiality, they focus on the mediator's duty to disclose any potential conflicts of interest, such as previous business or personal relationships.¹⁷⁶ Despite the duty of impartiality, the Standards allow, and in fact encourage, the mediator to ensure a balanced process, informed consent and fairness.

One of the more vague provisions seems to conflict with the mediator's duty of impartiality. The following provision is vague to the extent that it does not specify whether it is referring to mediator impartiality or neutrality:

Impartiality is not the same as neutrality in questions of fairness. Although a mediator is the facilitator and not a party to the negotiations, should parties come to an understanding that the mediator finds inherently unfair, the mediator is expected to indicate his or her non-concurrence with the decision in writing.¹⁷⁷

First, the provision attempts to distinguish between impartiality and neutrality, but in doing so, never defines either term. Second, if a mediator is to be impartial and neutral, she should not interject her personal opinions. Yet, the provision allows the mediator to specifically state in writing that she believes a decision is "inherently unfair." Such non-concurrence can have a dramatic effect on the parties' decision because what the mediator considers to be unfair does not necessarily equate to the parties' interpretations of fairness. As a result, the parties may renege on an otherwise mutually satisfactory agreement.

¹⁷⁵ See *supra* note 167 and accompanying text.

¹⁷⁶ *Id.* at IV.

¹⁷⁷ *Id.* at IV.A.

Other problematic provisions exist within Illinois' Standards. A mediator is responsible to "assist participants in considering the best interests of children and other persons who are unable to give voluntary, informed consent."¹⁷⁸ A mediator is given great leeway to suspend or terminate a mediation if it "appears that the parties are acting in bad faith, if either party appears not to understand the negotiation, if the prospects of achieving a responsible understanding appear unlikely or if the needs and interest of minor children are not being considered by the parties."¹⁷⁹ Each provision allows a mediator to interject her personal opinion and/or judgment. Each provision, therefore, enables behavior that contradicts the notion of mediator impartiality. Perhaps the Mediation Council of Illinois attempted to ameliorate these contradictions by not actually defining what "impartiality" means.

III. ANALYSIS: WHY ETHICAL STANDARDS OF CONDUCT CREATE CHAOS FOR MEDIATORS

A. *Summary of the Problem Posed by the Research*

The basic problem presented in this article is that governmental entities and professional organizations are promulgating ethical Standards of conduct that provide vague and internally inconsistent provisions. Appendix A illustrates that every state Standard requires mediator impartiality. Likewise, many definitions of mediation include a key provision that requires the mediator to serve as a neutral and impartial third party.¹⁸⁰ Yet, how is a mediator to remain

¹⁷⁸ *Id.* at IV.C.

¹⁷⁹ MCI Prof'l Standards of Practice for Mediators, III.D.5 (2003), *available at* <http://www.mediationcouncilofillinois.org/standardspractice.htm>.

¹⁸⁰ A sampling of mediation definitions include: "[F]acilitated negotiation," STEPHEN J. WARE, ALTERNATIVE DISPUTE RESOLUTION 201 (2001); "[A]n informal process in which a neutral third party with no power to impose a resolution helps the disputing parties to try to reach a mutually acceptable settlement," ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION 2 (1994); "Third party dispute settlement technique integrally related to the negotiation process whereby a skilled, disinterested neutral assists parties in changing their minds over conflicting needs mainly through the noncompulsory applicants of various forms of persuasion in order to reach a viable agreement on terms at issue,"

neutral and impartial if the mediator must ensure or promote a fair result, or otherwise adhere to concepts of fairness including a balanced process and informed decision making?

The answer is simple. A mediator's responsibility to ensure fairness cannot stand side by side with requirements of mediator neutrality and impartiality. A mediator's ability to assure a balanced process or promote informed decision making create a slippery slope; if not handled carefully, a mediator easily can exceed requirements of neutrality and impartiality.

Consequently, Standards create chaos for mediators who seek to comply with the ethical duties of neutrality and impartiality. Mediators cannot comply with all provisions within a single set of Standards. The remaining portion of this Part III summarizes some perceived problems with the Standards to illustrate why they are vague and somewhat inconsistent.

B. The Chaos that Results from Vague and Internally Inconsistent Provisions of Ethical Standards

Appendix A sets forth a chart that compares various principles of statewide Standards, namely mediator impartiality, party self-determination and fairness concepts. A detailed explanation of these principles is found at Part II of this article. As explained in Part II,

DOUGLAS H. YARN, editor, *DICTIONARY OF CONFLICT RESOLUTION* 275 (1999); "[T]he intervention into a dispute or negotiation by an acceptable, impartial, and neutral third party who has no authoritative decision-making power to assist disputing parties in voluntarily reaching their own mutually acceptable settlement of issues in dispute," *Id.* at 277; "[A] process involving a neutral third party in a purely facilitative, process-director's role, who makes no substantive contribution to the parties' struggle with the dispute," DWIGHT GOLANN, *MEDIATING LEGAL DISPUTES: EFFECTIVE STRATEGIES FOR LAWYERS AND MEDIATORS* § 10 (1996) (MARJORIE CORMAN AARON, contributing author) (hereafter "GOLANN, *MEDIATING LEGAL DISPUTES*") (offering a definition of mediation that essentially precludes mediator evaluation); "A process in which the disputing parties select a neutral third party to assist them in reaching a settlement of the dispute. The process is private, voluntary, informal and nonbinding. The mediator has no power to impose a settlement," YARN, *supra* note 176 at 277; "[A]n impartial third party helps others negotiate to resolve a dispute or plan a transaction. Unlike a judge or arbitrator, the mediator lacks authority to impose a solution," LEONARD L. RISKIN & JAMES E. WESTBROOK, *DISPUTE RESOLUTION AND LAWYERS* 313 (2d ed. 2003); and "A voluntary process in which an impartial mediator actively assists disputants in identifying and clarifying issues of concern and in designing and agreeing to solutions for those issues," YARN, *supra* note 176 at 278.

Standards pose dilemmas for the practicing mediator – namely, whether a mediator can simultaneously maintain impartiality and fairness.

First, despite the creation of the Uniform Mediation Act, no uniformity exists. Only six states and the District of Columbia have adopted the UMA.¹⁸¹ Because the UMA concentrates primarily on confidentiality and privilege principles, it is not considered an ethical code of conduct. In fact, most states that have adopted the UMA have enacted separate ethical Standards.

The adoption of various Standards, whether court-connected or by a professional organization, brings little in the way of uniformity to the Standards. Provisions regarding impartiality are many and varied.¹⁸² Some Standards define impartiality; some do not. Some relate impartiality to mediator conduct while others relate impartiality to conflict of interest principles. The only uniformity that does exist is the fact that every set of Standards includes some requirement of mediator impartiality.¹⁸³

To the extent that impartiality provisions are not defined, they are vague and susceptible to many different interpretations. For example, explanations that a mediator is to act in an “impartial and evenhanded” manner provide little guidance to the practicing mediator. Even worse are mediator impartiality provisions that require a mediator to act in an “impartial” manner without providing any further explanation. Many mediator impartiality provisions, therefore, are vague.

Other instances of vague terms relate to fairness concepts. Many states require “fairness” of the mediation or mediator, yet do not explain what “fairness” means.¹⁸⁴

¹⁸¹ See *supra* notes 39 – 45 and accompanying text.

¹⁸² See *supra* Part II.C.1 of this article.

¹⁸³ See *infra* Appendix A.

¹⁸⁴ See *infra* Appendix A, n.1, 2, 5, 7, 14, 33, 35, 44, 51, 54 and 64.

Besides the vagueness problem, many Standards pose internally inconsistent terms. For example, the state Standards for Georgia, Illinois, Indiana, Massachusetts and West Virginia all require mediator impartiality concurrently with the mediator's responsibility to ensure a fair result.¹⁸⁵ As previously discussed, once a mediator attempts to guarantee fairness, whether dealing with process or substantive issues, her actions may create tension with the requirement of mediator impartiality because of the one-sided nature of the mediator's conduct or even the appearance that the mediator may be helping one party to the disadvantage of the other. Mediator responsibility for a balanced process and informed decision making also may collide with mediator impartiality, especially when the mediator's conduct appears to aid only one party.

An exception relates to the Georgia Ethical Standards for Mediators. Although these standards mandate mediator impartiality while concurrently requiring a mediator to address power imbalances between the parties, they sufficiently explain that a balance of power is necessary to attain party self-determination albeit granting wide discretion to the mediator.¹⁸⁶ If the mediator cautions the parties at the beginning of the mediation regarding balance of power issues, later during the mediation she can refer back to her instructions in an impartial and neutral manner. Such a scenario, however, creates a big "if."

The foregoing highlights just a few examples of vague and internally inconsistent provisions that exist in many state Standards. Nevertheless, these examples illustrate the chaos created for mediators who attempt to comply with all provisions within a single set of Standards.

IV. RECOMMENDATIONS

¹⁸⁵ See *infra* Appendix A.

¹⁸⁶ See *supra* notes 157 – 158 and accompanying text.

Mediation as a practice is in its infancy when compared to other professions. As mediation develops, it needs to maintain credibility. The seemingly conflicting Standards perhaps recognize the multifaceted nature of, and need for, flexibility in the mediation process.

Under the current structure, however, rarely can a mediator truly act as a neutral and impartial outsider, especially when she attempts to attain a fair result, achieve other concepts of fairness, balance power struggles and promote informed decisions. As a mediator attempts to comply with all of the applicable Standards and guidelines, she may actually become embroiled in the dispute. The current state of mediation, therefore, is that traditional definitions of mediation¹⁸⁷ cannot co-exist with ethical Standards, and the vagueness of interrelated concepts within a single set of Standards creates tension for mediators.

To correct the problem, several alternatives are proposed to stimulate a new dialogue among mediators, scholars, legislators and regulators that allows the fluidity envisioned for the mediation process. The alternatives focus on the mediator's dilemma – the tension created by concurrent duties of impartiality and fairness. One recommends that for states that have no Standards, the development of such Standards be held in abeyance. The others recommend that the definition of mediation and applicable Standards be modified in varying degrees. Most notably, the definition of mediation can be simplified to delete requirements of impartiality or Standards that include vague and internally inconsistent provisions can be clarified and then ethical concerns arranged in hierarchical order.

A. Alternative 1: The No Action Approach to Developing Ethical Standards of Conduct

Currently, fifteen states do not have ethical standards of conduct for mediators even though most of these jurisdictions recognize and embrace the benefits of mediation. I have

¹⁸⁷ See *supra* note 180 for examples of the definition of mediation.

communicated with individuals in a handful of states while preparing Appendix A to this article. Common themes for not developing Standards are that: 1) the mediation industry has not developed enough in a particular state; and 2) difficulty exists in developing provisions that are consistent with traditional mediator styles and written with the clarity necessary to be instructive to the practicing mediator. The reasons for not adopting Standards are beyond the scope of this article; this line of questioning has not been pursued with all fifteen jurisdictions that lack Standards.

Nevertheless, the dialogue needs to address whether or not ethical Standards are providing the necessary guidance that mediators desire and need. Are the Standards helpful to both mediators and all parties who participate in the mediation process?

The first alternative, therefore, is the no action alternative, which means that ethical Standards should not yet be developed in those states that currently lack them. While this alternative promotes the fluid nature of mediation, it also eliminates mediator regulation and to some extent may limit mediator education and training about ethical issues.

One caveat exists regarding Alternative 1; it does not apply to those states that currently operate pursuant to mediator Standards. Many people have engaged in extensive and thoughtful work to develop existing Standards. Discarding their efforts entirely seems outrageous. Rather, these states should consider the second and third Alternatives discussed below.

B. Alternative 2: Revising Definitions of Mediation and Standards of Conduct to Delete the Requirement of Mediator Impartiality

Several scholars have theorized that, indeed, a mediator cannot be neutral and impartial. Robert D. Benjamin has theorized that rather than being objective and neutral, mediators should be “balanced” in their communications with parties to protect both parties rather than either

one.¹⁸⁸ The mediator cannot be neutral, theorizes Benjamin, because the mediator becomes part of the system.¹⁸⁹ This statement goes a bit far because it over generalizes mediators' behavior.

For example, a mediator might be able to remain neutral if she does not offer alternatives or advice that benefit only one party. A mediator who, with the participants' approval, offers an opinion regarding the merits of the case and a probable outcome does not necessarily lose her neutrality and impartiality as long as she does not urge the parties to adopt this position.¹⁹⁰

Semantics aside, whether a mediator employs balancing or evaluative techniques, the dilemma persists. Can the mediator conduct the mediation pursuant to the governing Standards – all of which require mediator impartiality and some of which advocate aspects of fairness?

Professor John Lande believes in the eclectic nature of mediation. He is not convinced that the existing principles of mediation – namely confidentiality and neutrality – are absolutely required for a successful mediation.¹⁹¹ Lande's approach makes sense.

Despite the traditional definitions of mediation based on key components of party self-determination, confidentiality and mediator neutrality and impartiality, industry standards and commercial dictates appear to be driving the profession in a new direction.¹⁹² Standards illustrate a new trend toward a fair result and related fairness concepts – aspirational concepts that are not part of the traditional definitions of mediation.¹⁹³

¹⁸⁸ See ROBERT D. BENJAMIN, *THE EFFECTIVE NEGOTIATION AND MEDIATION OF DISPUTES: APPLIED THEORY AND PRACTICE HANDBOOK*, "UNDERSTANDING OPERATIVE MYTHOLOGY" (9th ed. 2003).

¹⁸⁹ *Id.*

¹⁹⁰ Lande makes a similar observation. See e.g., John Lande, *Symposium: How Will Lawyering and Mediation Transform Each Other*, 24 FLA. ST. U.L. REV. 839, 876 (1997).

¹⁹¹ John Lande, *Symposium: Toward More Sophisticated Mediation Theory*, 2000 J. DISP. RESOL. 41, 332-33 (2000) (acknowledging that many effective mediators have some ties to the disputing participants, such as mediators who are members of organizations, tribes and communities connected to the participants, Postal Service mediators involved in employment cases and ombuds who are employed by a participating organization).

¹⁹² See *supra* note 3.

¹⁹³ See *supra* note 180.

The tendency to embrace fairness concepts means that mediation practices are changing. The Standards and stand-alone definition of mediation should change accordingly. Aside from potential conflict of interest relationships, query whether a mediator needs to maintain neutrality and impartiality in other respects? The result is that mediation can be redefined simply as:

A process of using a third party to assist disputants to reach a desired goal.

The new, simplified definition of mediation deletes requirements of mediator neutrality and impartiality. It is generic enough to apply to many different mediation models, and as a result, permits mediation to continue as a fluid, flexible process. Concurrently Standards of conduct would need to be modified to specifically distinguish between mediator impartiality and conflict of interest so that impartiality provisions can be deleted while conflict of interest provisions remain intact. Without requirements of neutrality or impartiality, a mediator can seek to assure fairness, whether defined as substantive, procedural or some related concept such as a balanced process and informed decision making.

Another benefit of the simplified definition of mediation relates to mediator styles or orientations. Although mediator styles is beyond the scope of this article, it should be noted that by removing requirements of mediator neutrality and impartiality from corresponding Standards, we enable any and all types of mediation models and mediator styles to comply simultaneously with the simplified definition of mediation and the simplified Standards.¹⁹⁴

Some scholars may view Alternative 2 as harsh and impracticable. They may argue that the mediation practice has progressed too far to take what may be considered a step backward or

¹⁹⁴ For example, the reference to “desired goal” easily can apply to issue deciding, problem solving and relational objectives – goals indicative of evaluative, facilitative and transformative mediators or any variation of these main mediator styles. The simple reference to “desired goals” need not be specified because all disputes have different needs and variables. Some parties may want to salvage a relationship, and therefore, facilitative communication is imperative. Other parties are more concerned with how to split the pie; any potential relationship is meaningless to them. The new definition of mediation, therefore, is generic enough to apply to many different mediator styles. Hence, all mediator styles can stand side-by-side with ethical Standards.

that the mediation process is flexible enough to sustain existing definitions of mediation. Other scholars believe that ethical opinions will help to fill the chasms left open by the inadequacies of the current Standards.¹⁹⁵

At least one scholar might criticize my attempt to simplify the definition of “mediation” because, as a descriptive definition, it may not be helpful if it lacks the dual components of structure and behavior. Professor Michael Moffitt has addressed a descriptive definition similar to my proposed definition of mediation. According to Professor Moffitt, defining mediators as “third parties, not otherwise involved in a controversy, who assist disputing parties in their negotiations,” provides a structural component as to who a mediator is. The broad, sweeping nature of the description, however, could extend to people engaged in other practices who might otherwise attempt to resolve a controversy. Such a definition, therefore, says “little.”¹⁹⁶

Professor Moffitt’s potential criticism fails to take into account that current definitions of mediator and mediation often are qualified, such as distributive mediator, facilitative mediator, community mediation, family law mediation, etc. Each qualifying word enhances the behavioral component that may appear lacking in my simplified definition of mediation.

Furthermore, none of the other possible criticisms take into account that the vast majority of jurisdictions have no enforcement mechanism. Only states such as Florida, Georgia and North Carolina have specific mechanisms in place to enforce ethical obligations of mediators and address consumer complaints about mediator conduct.¹⁹⁷ Until such time as standardized enforcement mechanisms are commonplace, ethical standards of conduct must be adequate to specifically address the mediator’s dilemma posed in this article or as might exist regarding other

¹⁹⁵ See Paula M. Young, *supra* note 2, at 200 (acknowledging that the revised Model Standards provide guidance and serve as a foundational framework for states that do not yet have mediation standards and advocating reliance on advisory or ethics opinions for more detailed assistance).

¹⁹⁶ Michael Moffitt, *Schmediation and the Dimensions of Definition*, 10 HARV. NEGOT. L. REV. 69, 88-89 (2005).

¹⁹⁷ See Paula M. Young, *supra* note 2 at n240.

mediation principles. Alternative 2 also aligns with the emerging trends that mediators ensure some type of fairness during the mediation process. As a result, the simplified definition of mediation alleviates the tension between mediator impartiality and fairness concerns.

C. Alternative 3: Clarifying Existing Standards of Conduct

This article seeks to explore the vague and conflicting nature of existing Standards. Professor Moffitt enunciates a similar approach regarding the revised Model Standards. He points out that the Standards “ignore ethical tensions” and fail to create any “hierarchy of ethical concerns” for mediators.¹⁹⁸ Professor Moffitt advocates for specific guidance by designating one standard that trumps the others.¹⁹⁹ Such approach would be analogous to the ABA Model Rules of Professional Conduct in which Rule 1.6, Confidentiality of Information, specifically trumps all but one designated rule.²⁰⁰

It is easier to create a hierarchy of ethical concerns if Standards are written with clarity. For example, impartiality provisions should be distinguished from conflict of interest provisions. Then, the impartiality provisions should specify the circumstances to which they apply – to process issues, substantive outcomes and mediator conduct. This approach aligns with Greg Firestone’s classification of mediator impartiality based on a grid configuration. The four quadrants of the grid relate to: 1) relationships between the mediator and the parties and attorneys, otherwise known as conflict of interest; 2) the mediator’s actions and conduct directed

¹⁹⁸ Michael L. Moffitt, *The Wrong Model, Again: Why the devil is not in the details of the New Model Standards of Conduct for Mediators*, DISP. RESOL. MAG. 31 – 32 (Spring 2006).

¹⁹⁹ *Id.*

²⁰⁰ Language in the following ABA Model Rules of Professional Responsibility illustrates that each of the rules is limited by ABA Model Rule 1.6: Rules 1.8(f), 1.9(b), 1.10(b), 1.14(c), 2.3(c), 4.1(b), 8.1(b) and 8.3(c). ABA Model Rule 3.3, Candor to the Tribunal, is the only rule that requires disclosure of information otherwise deemed confidential pursuant to Rule 1.6.

toward the parties; 3) the relationship between the mediator and the outcome; and 4) the mediator's conduct towards the outcome.²⁰¹

Likewise, the fairness provisions need to be modified and clarified. The provisions need to specify whether they apply to process issues, substantive outcomes, or relational issues between the parties. The provisions need to be clear enough so that Standards may provide guidance to mediators. It is not fair to the parties or mediators to sit back and wait for party complaints that may stimulate ethical opinions to interpret black letter Standards.

Finally to offer clarity and guidance, Standards also could follow the Georgia model in which the black letter rule is followed by exhaustive comments, hypotheticals and recommendations. The Georgia Ethical Standards are helpful because they include a rich discussion of detailed ethical scenarios that pose tensions between one or more ethical principles. The recommendations that follow each scenario offer much-needed guidance to mediators who may encounter the same or similar situation.

Some scholars may claim that Alternative 3 obviates the flexible nature of the mediation process by making rules that are too rigid and specific. This should not be true. All that Alternative 3 proposes is clarity so that mediators can learn how to deal with their ethical dilemmas. Once the provisions are clarified, they should then be organized in a hierarchical manner to alleviate internal inconsistencies within a single set of Standards.

V. CONCLUSION

The chasm between mediation theory and practice is becoming more widespread as mediation matures and becomes widely known and used. The drafting of written definitions and Standards may appear easier than their practical implementation, and in fact, this article

²⁰¹ Paula M. Young, *supra* note 2, at 209 – 219 (citing to Greg Firestone's presentation at the ACR's 2003 annual conference).

illustrates how existing Standards create chaos for mediators by including internally inconsistent provisions or otherwise not defining or developing provisions to a helpful extent.

It is time to begin a dialogue. Although I am not ready to commit to a single course of action, various recommendations are posed to help start the conversation, while at the same time recognizing the fluid nature of mediation. The recommendations include:

4. Take no action, otherwise known as the no-action alternative. This alternative is limited to those states that have not yet developed Standards.
5. Revise Standards and definitions of mediation to delete requirements of mediator impartiality. By simplifying the definition of mediation – “a process of using a third party to assist disputants to reach a desired goal” – this alternative deletes requirements of mediator impartiality and aligns with the current trend toward achieving some aspect of fairness.
6. Modify existing Standards to clarify otherwise vague provisions, enhance corresponding commentary, and where necessary, create a hierarchy of ethical concerns within a single set of Standards.

The recommendations in this article serve as a starting point to avert the chaos that is slowly being recognized by mediators who attempt to maintain impartiality simultaneously with attempts to ensure some type of fairness. Let us join together in constructive dialogue to determine how best to address ethical concerns while maintaining the credibility of the mediation process.

APPENDIX A

**Mediation Standards of Conduct
Comparison by States
Current Through January 1, 2006**

State	Mediation Standards	Court Connected	Prof. Organization	Require Mediator Impartiality	Address Party Self-Determination	Ensure Fair Result	Promote Procedural Fairness	Promote Fairness	Promote Balanced Process	Promote Informed Decisions	Date
Alabama	Alabama Code of Ethics for Mediators, available at http://alabamaadr.org/flashSite/Standards/al_code_ethics.html	✓		✓	✓			✓ ¹	✓	✓	Eff. 3-1-96, including amends. through 6-1-97
Alaska*	Alaska R. Civ. Proc. 100 provides for mediation and other forms of ADR										
Arizona*	Ariz. R. Civ. Proc. 16(g) authorizes ADR processes; statewide mediation standards do not exist although many mediators voluntarily use the Aug. 2005 Revised Model Standards of Conduct for Mediators										
Arkansas	Arkansas ADR Comm'n Requirements for the Conduct of Mediation and Mediators, <i>available at</i> http://courts.state.ar.us/pdf/0516_conduct.pdf	✓		✓	✓			✓ ²	✓		Effective 4-13-2001
California	Rules of Conduct for Mediators in Court-Connected Mediation Programs for Civil Cases, Cal. Rules of Court R. 1620 – 1622	✓		✓	✓	No ³	✓ ⁴		✓ ⁴		Effective 1-2003
Colorado	Mediators Revised Code of Professional Conduct of 2005 is the mandatory code of the Colorado Council of Mediators (CCMO) which adopted the Aug. 2005 Model Standards of Conduct for Mediators, <i>available at</i> http://www.coloradomediation.org/Resources/index.htm	✓	✓	✓	✓		✓			✓ ⁶	Adopted 1995; revised 2005
	Colorado Model Standards of Conduct for Mediators of 1999 is a voluntary code, <i>available at</i> http://www.dola.state.co.us/SmartGrowth/ADRMediators/Documents/modelstandards.pdf	✓		✓	✓			✓ ⁵			
Connecticut*											
Delaware*	Del. Super. Ct. Civ. R. 16.1 recognizes ADR processes. Guidelines for Superior Court Mediation are available at http://courts.state.de.us/Courts/Superior%20Court/ADR/ADR/adr_med-guideline.htm										
Florida	Florida Rules for Certified and Court-Appointed Mediators, <i>available at</i> http://flcourts.org/gen_public/adr/index.shtml	✓		✓	✓			✓ ⁷	✓	✓ ⁸	Effective 5-1992; revised 2000
Georgia	Ethical Standards for Neutrals are Appendix C to the Alternative Dispute Resolution Rules <i>available at</i> http://www.godr.org/ethics_info.html . The ADR Rules were adopted effective 10-22-1992.	✓		✓	✓	✓ ⁹	✓ ¹⁰		✓ ¹¹	✓ ¹²	Standards established 9-28-1995; last amended 11-29-2005

State	Mediation Standards	Court Connected	Prof. Organization	Require Mediator Impartiality	Address Party Self-Determination	Ensure Fair Result	Promote Procedural Fairness	Promote Fairness	Promote Balanced Process	Promote Informed Decisions	Date
Hawaii	Guidelines for Hawaii Mediators, <i>available at</i> http://www.courts.state.us/page_server/Services/AlternativeDispute/Standards/74F59E516BBAE08CEBC3B48770.html	✓		✓ ¹³	✓			✓ ¹⁴		✓ ¹⁵	7-11-2002
Idaho	Idaho Mediation Ass'n Standards of Practice for Idaho Mediators, <i>available at</i> http://www.idahomediatio.org/sop.pdf		✓	✓						✓ ¹⁶	Not Available
Illinois	MCI Prof. Standards of Practice for Mediators, <i>available at</i> http://www.mediationcouncilofillinois.org/standardspractice.htm . Illinois has adopted the UMA, 710 ILL. COMP. STAT. §§ 35/1-35/13, 35/16, 35/16 & 35/99 (2005)†		✓	✓	✓	✓ ¹⁷			✓	✓	Revised 4-2003
Indiana	Indiana Rules of Court, Rules for ADR, <i>available at</i> http://www.in.gov/judiciary/rules/adr	✓		✓	✓ ¹⁸	✓ ¹⁹					Adopted eff. 1-1-1992; last amended eff. 1-1-2006
Iowa	Iowa Ass'n for Dispute Resolution Model Standards of Conduct for Mediators, <i>available at</i> http://www.iowaadr.org/Standards.htm . Iowa has also adopted the UMA at IOWA CODE §§ 679C.101 – 679C.115 (2005).†		✓	✓	✓		✓ ²⁰			No	12-5-2002
Kansas	Rules Adopted by the Kansas Supreme Court, Rules Relating to Mediation, Rule 903 re Ethical Standards for Mediators, <i>Available at</i> http://www.kscourts.org/ctruls/adrruls.htm	✓		✓	✓		✓ ²¹			No	Effective 7-1-1996
Kentucky*	Kentucky Rules Annotated, Model Mediation Rules, <i>available at</i> http://www.kycourts.net/AOC/MAFCS/MAFCS_MSRRules.shtm address mediation										
Louisiana*	Louisiana Rules for Civil (Non-family or Domestic Relations) Proceedings in District Courts, Rule 11, Louisiana Mediation Act										
Maine*	Maine Rules of Civil Procedure 16B addresses ADR processes										
Maryland	Maryland Standards of Conduct for Mediators, Arbitrators and Other ADR Practitioners, <i>available at</i> http://www.courts.state.md.us/macro/rules_standards.html	✓		✓	✓		✓ ²²		✓ ²³	No ²⁴	Not Available
Massachusetts	ALM Sup. Jud. Ct. Rule 1:18, § 9 (2005)	✓		✓		✓ ²⁵				✓ ²⁶	Effective 10-1-1998
Michigan	Michigan Supreme Court Standards of Conduct for Mediators, <i>available at</i> http://www.courts.michigan.gov/scao/dispute/odr.htm	✓		✓	✓		✓ ²⁷				Effective 1-4-2001
Minnesota	Minn. Gen. R. of Prac. For the Dist. Cts. 114 Appendix, Code of Ethics, <i>available at</i> http://www.courts.state.mn.us/rules/general/grtitleII.htm	✓		✓	✓		✓ ²⁸			No ²⁹	Effective 8-27-1997, Including amends. Through 1-1-2006

State	Mediation Standards	Court Connected	Prof. Organization	Require Mediator Impartiality	Address Party Self-Determination	Ensure Fair Result	Promote Procedural Fairness	Promote Fairness	Promote Balanced Process	Promote Informed Decisions	Date
Mississippi	Court Annexed Mediation Rules for Civil Litigation, <i>available at</i> http://www.mssc.state.ms.us/rules/Body.asp	✓		✓	✓		✓ ³⁰			No ³¹	Amended effective 6-27-2002
Missouri*	Rules Governing the Missouri Bar and the Judiciary, Rule 17 relates to ADR										
Montana	Montana Mediation Ass'n Standards of Practice, Ethical Guidelines for Full Members, <i>available at</i> http://www.mtmediation.org/images/Assoc_Full_App_with_ethics_and_qual.pdf		✓	✓	✓ ³²			✓ ³³		✓ ³⁴	Adopted 9-10-1998
Nebraska	Uniform Mediation Act, NEB. REV. STAT. §§ 25-2930 to 25-2942.† Nebraska Mediation Center Association has not adopted any general mediation standards; however, the Office of Dispute Resolution collaborates between ODR, the ODR Advisory Council and the mediation centers. ODR has a Manual of Standards and Ethics for Center Mediators, Directors and Staff which is available in its offices. Currently, the Manual is not available online.		✓	✓				✓ ³⁵	✓ ³⁶		Effective 8-31-2003 Revised 6-2001
Nevada*											
New Hampshire	Rules of the Superior Court of the State of New Hampshire 170(J), Guidelines for Rule 170 Mediators	✓		✓ ³⁷	✓		✓ ³⁸			No ³⁹	Not Available
New Jersey	Standards of Conduct for Mediators in Court-Connected Programs, <i>available at</i> http://www.judiciary.state.nj.us/notices/n000216a.htm In addition to the Standards, New Jersey has adopted the UMA.† New Jersey Association of Professional Mediators Code of Professional Ethics, <i>available at</i> http://www.njapm.org/pg/about_njapm/codeEthics.html	✓		✓	✓		✓ ⁴⁰			No ⁴¹	Not Available 2003
New Mexico	New Mexico Mediation Association Mediation Ethics and Standards of Practice, <i>available at</i> http://www.nmma.info/images/EthicsandStandards.pdf		✓	✓	✓						Not Available
New York	Standards of Conduct for Mediators (applicable to the ADR Program of the Supreme Court Commercial Division, <i>available at</i> http://www.nycourts.gov/comdi/ADRethicsformediators.htm)	✓		✓	✓		✓ ⁴²		✓	No ⁴³	3-1-2000
North Carolina	N.C. Standards of Prof. Conduct for Superior Court Mediators, part of the Annotated Rules of North Carolina (2005)	✓		✓	✓			✓ ⁴⁴	✓ ⁴⁵	✓ ⁴⁶	Effective 10-1-1999
North Dakota*	N.D. Rules of Ct. 8.8 (2005) recognizes ADR										

State	Mediation Standards	Court Connected	Prof. Organization	Require Mediator Impartiality	Address Party Self-Determination	Ensure Fair Result	Promote Procedural Fairness	Promote Fairness	Promote Balanced Process	Promote Informed Decisions	Date
Ohio*	Ohio's Uniform Mediation Act is found at OHIO'S REV. CODE ANN. §§ 2710.01 to 2710.10 (Baldwin 2005).† The Ohio State Office of Dispute Resolution promotes the voluntary use of the Aug. 2005 Revised Model Standards of Conduct for Mediators although Ohio has not officially adopted them.										Effective 10-29-2005
Oklahoma	Code of Professional Conduct for Mediators, OKLA. STAT. tit. 12, ch. 37, App. A (2005)	✓		✓	✓						Adopted 4-8-1986; Revised 4-20-1989
Oregon	Ore. UTCR 12.530, Mediator Standards of Conduct Oregon Mediation Association Core Standards of Mediation Practice, available at http://www.mediate.com/oma		✓	✓ ⁴⁷	✓					✓ ⁴⁸	Repealed 8-1-2005 Revised 4-23-2005
Pennsylvania*	23 PA. CONS. STAT. ANN. § 3901 (2005) recognizes mediation programs for divorce and custody matters.										
Rhode Island*	The Rhode Island Supreme Court has established an appellate mediation program. See RI Sup. Ct. Art. I, App. A (2005).										
South Carolina	Standards of Conduct for Mediators, S.C. Rules, Cir. Ct. ADR App. B (2004) [Applicable to Charleston, Florence, Horry, Lexington, and Richland Counties Only]	✓		✓	✓		✓ ⁴⁹				Effective 7-1-2000
South Dakota*											
Tennessee	Standards of Professional Conduct for Rule 31 Neutrals, Tenn. Sup. Ct. Rule 31, App. A (2005)	✓		✓ ⁵⁰	✓			✓ ⁵¹	✓	✓ ⁵²	Effective 3-1-2003
Texas	Standards and Duties of Impartial Third Parties, TEX. CIV. PRAC. & REM. CODE § 154.053 (2005) Ethical Guidelines for Mediators of the State Bar of Texas, available at http://www.texasadr.org/ethicalguidelines.cfm (intended to apply to court-connected mediations, whether court-ordered or voluntary)	✓		✓	✓						Effective 9-1-1999 Not Available
Utah	Utah Rules of Court-Annexed Alternative Dispute Resolution, Rule 104, Code of Ethics for ADR Providers (2005)	✓		✓	✓		✓ ⁵³				Amended Effective 11-1-2002
Vermont	Vermont Mediators Association Standards of Mediation Practice, available at http://vma.freeyellow.com/full_vma_standards_Nov_2000.htm Vermont Court Rule 16.3 addresses ADR processes, including Mediation.		✓	✓				✓ ⁵⁴	✓ ⁵⁵	✓ ⁵⁶	Adopted 6-1-1990; Last Rev. 11-13-2000
Virginia	Standards of Ethics and Professional Responsibility for Certified Mediators, available at http://www.courts.state.va.us/soe/soe.htm	✓		✓	✓ ⁵⁷		✓ ⁵⁸		✓ ⁵⁹	✓ ⁶⁰	Web Page Last Modified 5-1-2005

State	Mediation Standards	Court Connected	Prof. Organization	Require Mediator Impartiality	Address Party Self-Determination	Ensure Fair Result	Promote Procedural Fairness	Promote Fairness	Promote Balanced Process	Promote Informed Decisions	Date
Washington	Washington Uniform Mediation Act, WASH. REV. CODE §§ 7.07.010 to 7.07.904 (2005). † Washington Mediation Association Standards of Practice for Mediators, <i>available at</i> http://www.washingtonmediation.org/ethics.html		✓	✓	✓		✓ ⁶¹				Effective 1-1-2006 Adopted 1997
West Virginia	West Virginia Trial Court Rule 25, <i>available at</i> http://www.state.wv.us/wvsca/rules/ctrules.htm	✓		✓	✓	✓ ⁶²					Not Available
Wisconsin	Ethical Guidelines for the Practice of Mediation of the Wisconsin Association of Mediators, <i>available at</i> http://www.wamediators.org/pubs/ethicalguidelines.html		✓	✓	✓		✓ ⁶³	✓ ⁶⁴		✓ ⁶⁵	Adopted 4-4-1997
Wyoming*	Wyo. R. Civ. Proc. Rule 40 (2005) provides for ADR processes										

*Does not have a statewide general set of civil mediator ethical standards of conduct

†Does not consider the Uniform Mediation Act as ethical standards of conduct

¹ Mediation “emphasizes . . . Fairness; . . .” “Prohibition of Coercion. A mediator shall not coerce or unfairly influence a party into entering into a settlement agreement.”

² Mediation “emphasizes: . . . (2.) Fairness and the merits of the issues as defined by the parties. . . .” “A mediator shall withdraw if [s/he] believes the mediation is being used to further illegal conduct . . . or would be the result of fraud, duress, overreaching, the absence of bargaining ability, or unconscionability.”

³ “A mediator is not obligated to ensure the substantive fairness of an agreement reached by the parties.”

⁴ “A mediator must conduct the mediation proceedings in a procedurally fair manner. ‘Procedural fairness’ means a balanced process in which each party is given an opportunity to participate and make uncoerced decisions.”

⁵ “The mediator should conduct the mediation fairly and diligently.” “If the parties insist on pursuing an agreement which the mediator knows or should know is in violation of the law, and has advised the parties of such, the mediator shall terminate the mediation.”

⁶ “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.”

⁷ “Mediation is based on concepts of communication, negotiation, facilitation, and problem-solving that emphasize: . . . (c) fairness”

⁸ “A mediator is responsible for assisting the parties in reaching informed and voluntary decisions”

⁹ “A mediator may refuse to draft or sign an agreement which seems fundamentally unfair to one party.”

¹⁰ “The mediator is the guardian of fairness of the process. In that context, the mediator must assure that the conference is characterized by overall fairness and must protect the integrity of the process.”

¹¹ “Although the mediator has a duty to make every effort to address a power imbalance, this may be impossible. At some point the balance of power may be so skewed that the mediation should be terminated.”

¹² “Parties cannot bargain effectively unless they have sufficient information. Informed consent to an agreement implies that parties not only knowingly agree to every term of the agreement but that they have had sufficient information to bargain effectively in reaching that agreement.”

¹³ “A mediator has a responsibility to maintain impartiality while raising questions for the participants to consider as to the reality, fairness, equity, and feasibility of proposed options for settlement.”

¹⁴ “Mediation is based on principles of communication, negotiation and problem solving that emphasize . . . fairness.” Preamble. *See supra* note 13.

¹⁵ “The mediator’s obligation is to assist the participants in reaching an informed and voluntary settlement.”

¹⁶ “The mediator has a duty to assist the participants in reaching an informed and voluntary settlement.”

¹⁷ A mediator is to indicate non-concurrence with decisions he or she “finds inherently unfair.” Rule 2.1. “A neutral shall not make any substantive decision for any party except as otherwise provided for by these rules.” Rule 7.5(C).

¹⁸ “Any agreement reached by the parties is to be based on the autonomous decisions of the parties and not the decisions of the mediator.”

¹⁹ “Rule 7.5, Fair, Reasonable and Voluntary Agreements.” A neutral shall not coerce the parties and “shall withdraw whenever a proposed resolution is unconscionable.”

¹⁸ “Quality of the Process: A mediator shall conduct the mediation fairly, diligently, and . . . consistent with . . . [party] self-determination. . . . A quality process requires a commitment by the mediator to diligent and procedural fairness.”

¹⁹ “Quality of the Process: A Mediator Shall Conduct the Mediation Fairly, Diligently, and in a Manner Consistent with the Principle of [Party] Self-Determination. . . . A quality process requires a commitment by the mediator to diligence and procedural fairness.

²² “Quality of the Process: A Neutral shall Conduct the Process Fairly, Diligently, and in a Manner Consistent with the Principle of Self-Determination by the Parties. . . . A quality process requires a commitment by the neutral to diligence and procedural fairness. There should be adequate opportunity for each party to participate in the discussions. . . .” “A mediator may withdraw from a mediation that will result in an illegal or unconscionable agreement.”

²³ “A mediator should be aware of power dynamics and assess whether a party may be experiencing coercion. When mediators perceive that coercion may exist, they should explore the issue in private with the party who may be experiencing coercion or end the mediation if there is an imminent safety concern.”

²⁴ “A mediator cannot personally ensure that each party has made a fully informed choice to reach a particular agreement, but a mediator should make the parties aware of the importance of consulting lawyers and other professionals, where appropriate, to help them make informed decisions and review contracts of agreements.”

²⁵ “[I]n cases in which one or more of the parties is not represented by counsel, a neutral has a responsibility, while maintaining impartiality, to raise questions for the parties to consider as to whether they have the information needed to reach a fair and fully informed settlement of the case.”

²⁶ “Informed Consent. The neutral shall make every reasonable effort to ensure that each party to the dispute resolution process (a) understands the nature and character of the process, and (b) in consensual processes, understands and voluntarily consents to any agreement reached in the process.”

²⁷ “Quality of the Process. A mediator shall conduct the mediation fairly and diligently. A mediator shall work to ensure a quality process and to encourage mutual respect among the parties. A quality process requires a commitment by the mediator to diligence and procedural fairness. There should be adequate opportunity for each party in the mediation to participate in the discussions.”

²⁸ “Quality of the Process. A neutral shall work to ensure a quality process. A quality process requires a commitment by the neutral to diligence and procedural fairness.”

²⁹ “A mediator cannot personally ensure that each party has made a fully informed choice to reach a particular agreement, but it is a good practice for the mediator to make the parties aware of the importance of consulting other professionals, where appropriate, to help them make informed decisions.”

³⁰ “Quality of the Process: A Mediator shall Conduct the Mediation Fairly, Diligently, and in a Manner Consistent with the Principle of Self-Determination by the Parties. A mediator shall work to ensure a quality process and to encourage mutual respect among the parties. A quality process requires a commitment by the mediator to diligence and procedural fairness. There should be adequate opportunity for each party in the mediation to participate in the discussions.”

³¹ “A mediator cannot personally ensure that each party has made a fully informed choice to reach a particular agreement, but is a good practice for the mediator to make the parties aware of the importance of consulting other professionals, where appropriate, to help them make informed decisions.”

³² “The dispute resolution process belongs to the parties.”

³³ “Neutrals must act fairly in dealing with the parties . . . and be certain that the parties are informed of the process in which they are involved.”

³⁴ “Informed Consent. The neutral has an obligation to assure that all parties understand the nature of the process, the procedures, the particular role of the neutral, and the parties’ relationship to the neutral.”

³⁵ Ethical Standard A is entitled “Impartiality, Neutrality, and Fairness” and requires a mediator to be impartial and fair.

³⁶ “If at any point the mediator comes to believe a case is inappropriate for mediation, then he or she shall terminate the mediation. Among the factors that may make a case inappropriate are physical or psychological victimization or significant inequality of knowledge or sophistication that impairs the ability of a party to protect his or her own interests or honor his or her own agreements.”

³⁷ “A mediator shall maintain impartiality while raising questions for the parties to consider as to the reality, fairness, equity and feasibility of the proposed options for settlement.”

³⁸ “Quality of the Process: A mediator shall conduct the mediation fairly, diligently, and in a manner consistent with the principle of self-determination by the parties. A mediator shall work to ensure a quality process and to encourage mutual respect among the parties. A quality process requires a commitment by the mediator to diligence and procedural fairness. There should be adequate opportunity for each party in the mediation to participate in the discussions.”

³⁹ “The mediator shall assist the parties in reaching an informed and voluntary settlement.” The comments to Rule 170(J)(1) state: “A mediator cannot personally ensure that each party has made a fully informed choice to reach a particular agreement, but it is a good practice for the mediator to make the parties aware of the importance of consulting other professionals, where appropriate, to help them make informed decisions.”

⁴⁰ “Quality of the Process: A mediator shall conduct the mediation fairly, diligently, and in a manner consistent with the principle of self-determination by the parties. To further these goals, a mediator shall: A. Work to ensure a quality process and to encourage mutual respect among the parties, including a commitment by the mediator to diligence and to procedural fairness.”

⁴¹ “Because a mediator cannot personally ensure that each party has made a fully informed choice to reach a particular agreement, a mediator should make the parties aware of the importance of consulting other professionals, where appropriate, to help them make informed decisions.”

⁴² “Quality of the Process: A mediator should conduct the mediation fairly, diligently, and in a manner consistent with the principle of self-determination. A mediator should work to ensure a process of high quality. This requires a commitment by the mediator to fairness, diligence, sensitivity toward the parties, and maintenance of an atmosphere of respect among the parties. The mediator should guarantee that there is adequate and fair opportunity for counsel and each party to participate in discussions.”

⁴³ “A mediator cannot personally ensure that each party has made a fully informed choice to reach a particular agreement. However, a party in the ADR Program will normally be represented by counsel and the mediator should provide full opportunity to parties and their attorneys to consult with each other and, if necessary, for both to consult with outside professionals.”

⁴⁴ “If, in the mediator’s judgment, the integrity of the process has been compromised by, for example, inability or unwillingness of a party to participate meaningfully, gross inequality of bargaining power or ability, gross unfairness resulting from non-disclosure or fraud by a participant, or other circumstance likely to lead to a grossly unjust result, the mediator shall inform the parties. The mediator may choose to discontinue the mediation”

⁴⁵ “If, in the mediator’s judgment, the integrity of the process has been compromised by, for example, inability or unwillingness of a party to participate meaningfully, gross inequality of bargaining power or ability, gross unfairness resulting from non-disclosure or fraud by a participant, or other circumstance likely to lead to a grossly unjust result, the mediator shall inform the parties. The mediator may choose to discontinue the mediation”

⁴⁶ “Where a party appears to be acting under undue influence, or without fully comprehending the process, issues, or options for settlement, a mediator shall explore these matters with the party and assist the party in making freely chosen and informed decisions.”

⁴⁷ “Mediators demonstrate Impartial Regard throughout the mediation process by conducting mediations fairly, diligently, even-handedly, and with no personal stake in the outcome.”

⁴⁸ “While a mediator cannot ensure that participants are making informed and voluntary decisions, mediators should help participants understand the process, issues, and options before them and encourage participants to make informed and voluntary decisions.” Standard I, Comment 4. “Mediators should make ongoing, good-faith efforts to assess the freedom and ability of each participant to make choices regarding participation in the mediation and

options for reaching agreement. In assessing the situation, the mediator should consider factors such as the abilities, learning style, language competency, and cultural background of each participant. Mediators should suspend, end, or withdraw from the mediation if they believe a participant is unable to give Informed Consent.” Standard II, Comment 5.

⁴⁹ “Quality of the Process: A Mediator Shall Conduct the Mediation Fairly, Diligently, and in a Manner Consistent with the Principle of Self-Determination by the Parties. A mediator shall work to ensure a quality process and to encourage mutual respect among the parties. A quality process requires a commitment by the mediator to diligence and procedural fairness. There should be adequate opportunity for each party in the mediation to participate in the discussions.”

⁵⁰ “A Neutral shall maintain impartiality while raising questions for the parties to consider as to the reality, fairness, equity, and feasibility of proposed options for settlement.”

⁵¹ The dispute resolution proceeding “emphasize[s] . . . fairness” Sec. 1(c). “A Neutral shall maintain impartiality while raising questions for the parties to consider as to the reality, fairness, equity, and feasibility of proposed options for settlement.” Sec. 6(a)(1).

⁵² “A Neutral engaged in mediation shall assist the parties in reaching an informed and voluntary settlement.” Sec. 5(a).

⁵³ “Canon I. ADR Providers Should Uphold The Integrity And Fairness Of The ADR Program. (a) Alternative Dispute Resolution is an important and proven method for resolving disputes. In order for ADR to be effective, there must be broad public confidence in the integrity and fairness of the process, similar to the confidence the public has in judges who adjudicate cases in the district court of this state. Like the court’s judges, ADR providers serving under the program must observe high standards of ethical conduct so that the integrity and fairness of the process will be preserved. . . .” “Canon III. ADR Providers Should Conduct The Proceedings Fairly And Diligently. (a) ADR providers should conduct the proceedings in an evenhanded manner and treat all parties with equality and fairness at all stages of the proceedings.”

⁵⁴ “The mediator should encourage each party to obtain the information necessary to make substantive agreements. If either party needs information or assistance before the negotiations can proceed in a fair and orderly manner or before a fair and equitable agreement can be reached, then the mediator should refer the parties to appropriate resources. The mediator should also ensure that the parties have adequate opportunity to consider and fully understand their options before reaching an agreement.”

⁵⁵ “The mediator should attempt to balance negotiations and should attempt to defuse manipulative or intimidating negotiation techniques by any party.”

⁵⁶ “Independent Legal Advice and Information. In mediations in which disputants personally represent their own individual interests and substantial legal issues exist, the mediator should encourage participants to obtain individual legal advice and individual legal review of any mediated agreement, as is reasonably necessary for the parties to reach an informed agreement.”

⁵⁷ “The mediator shall promote a balanced process”

⁵⁸ “Quality of the Process. If, in the mediator’s judgment, the integrity of the process has been compromised by, for example, inability or unwillingness of a party to participate meaningfully, gross inequality of bargaining power or ability, gross unfairness resulting from nondisclosure or fraud by a participant, the mediator shall inform the parties.”

⁵⁹ “The mediator shall promote a balanced process”

⁶⁰ “The mediator shall encourage the participants 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 participant.”

⁶¹ “Quality of the Process: A Mediator Shall Conduct the Mediation Fairly, Diligently, and in a Manner Consistent with the Principle of Self-Determination by the Parties. A mediator shall work to ensure a quality process and to encourage mutual respect among the parties. A quality process requires a commitment by the mediator to diligence and procedural fairness. There should be adequate opportunity for each party in the mediation to participate in the discussions. The parties decide when and under what conditions they will reach an agreement or terminate a mediation.”

⁶² A mediator cannot compel parties to settle. “All parties . . . shall be prepared to negotiate openly and knowledgeably about the case in a mutual effort to reach a fair and reasonable settlement.”

⁶³ Mediators “respect the right of parties to make informed decisions. We help parties understand the consequences of those decisions in a context of procedural fairness.”

⁶⁴ “Mediation is based on principles of fairness, privacy and self-determination of the parties.” Preamble.

⁶⁵ Mediators “respect the right of parties to make informed decisions. We help parties understand the consequences of those decisions in a context of procedural fairness.”