

Maryland Standards of Conduct For Mediators, Arbitrators and Other ADR Practitioners

Preface

These Standards of Conduct for ADR practitioners are intended to perform three major functions: to serve as a guide for the conduct of ADR practitioners; to inform the participants involved in ADR processes; and to promote public confidence in ADR processes as a means for resolving disputes or addressing issues. The Standards draw on existing codes of conduct and take into account issues and problems that have surfaced in ADR practice.

Key

The following key codes will identify which ADR Practitioners should follow each of the standards defined below:

A = Arbitrators, **FF** = Fact Finders, **M** = Mediators (this category includes Consensus Building Facilitators, also known as Public Policy Mediation Facilitators and Collaborative Problem Solving Facilitators), **NE** = Neutral Evaluators (this category includes Non-Binding Arbitrators), **SC** = Settlement Conference Facilitators

All ADR practitioners may be referred to by the term "**neutrals**," and comments that mention "neutrals," absent a key code, refer to all ADR practitioners. In these cases, neutrals are expected to uphold the applicable standards of each process in which they engage. Although a neutral should not perform more than one ADR process at a time, a neutral may be engaged to perform more than one ADR process sequentially (such as med/arb).

Standards of Conduct

I. Self-Determination: A Neutral shall Recognize that Arbitration, Fact Finding, Mediation, Neutral Evaluation and Settlement Conferencing are Based on the Principle of Self-Determination by the Parties.

A, FF, M, NE, SC

Self-determination is the fundamental principle of mediation and it plays a more circumscribed role in other consensus-based ADR processes. In mediation, this principle requires that the mediation process rely upon the ability of the participants to reach their own voluntary, uncoerced agreement. Any party may withdraw from mediation at any

time. Other ADR practices reflect this principle by giving the parties the ultimate decision-making power (FF, NE, SC) or by allowing them to define the scope of a process in which a decision is rendered (A).

Comments:

A If an arbitration is conducted under the Federal Arbitration Act, the Maryland Uniform Arbitration Act, or common law rules governing arbitration, an arbitrator makes a decision which is binding on the parties. If conducted solely pursuant to Title 17 of the Maryland Rules, and there is no agreement to the contrary, the arbitration is non-binding and the parties may accept or reject the award.

FF A fact finder determines certain facts at the request of the parties. The fact finder is responsible for explaining the method(s) of determination used and, unless the parties agree in writing to be bound by the fact finder's determination, they may accept or reject the determination.

M The primary role of the mediator is to facilitate a voluntary resolution of a dispute. Before commencing, the mediator is responsible for explaining the process to the participants. A mediator may provide information without giving legal or other professional advice, ask questions, identify issues, and help parties explore options.

M 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.

M 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.

NE A neutral evaluator, after considering presentations by the parties, renders an opinion as to the issue(s) presented, which may often be the value of a lawsuit. The neutral evaluator is responsible for explaining the method(s) of determination used and the participants may accept or reject the determination.

SC A settlement conference facilitator may recommend the terms of a settlement and may encourage the participants to settle a lawsuit. The participants may accept or reject the recommended settlement.

II. Impartiality: A Neutral shall Conduct the ADR Process in an Impartial Manner.

A, FF, M, NE, SC

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.

Comments apply to all neutrals:

- A neutral shall avoid conduct that gives the appearance of partiality toward one of the parties. The quality of the process is enhanced when the parties have confidence in the impartiality of the neutral.
- When neutrals are appointed by a court or institution, the appointing agency shall make reasonable efforts to ensure that neutrals serve impartially.
- A neutral should guard against partiality or prejudice based on the parties' personal characteristics, background or behavior during the ADR process, except where these factors are relevant to recommendations or conclusions that non-mediator ADR practitioners are asked to provide.

III. Conflicts of Interest: Neutrals shall Disclose all Actual and Potential Conflicts of Interest Reasonably Known to Them. After Disclosure, Neutrals shall Decline to Participate unless all Parties Choose to Retain Them. The Need to Protect Against Conflicts of Interest also Governs Conduct that Occurs During and After the ADR Proceeding.

A, FF, M, NE, SC

A conflict of interest is a dealing or relationship that creates or might create an impression of possible bias. The basic approach to questions of conflict of interest is consistent with the concept of self-determination. Neutrals have a responsibility to disclose all actual and potential conflicts that are reasonably known to them and could reasonably be seen as raising questions about impartiality. If all parties agree to participate in the ADR process after being informed of conflicts, the neutral may proceed. If, however, the conflict of interest casts serious doubt on the integrity of the process, the neutral shall decline to proceed. Neutrals must avoid conflicts of interest both during and after the ADR process, such as representing one party against the other party in an adversarial proceeding

Comments:

- **M, SC** Potential conflicts of interest may arise between administrators of ADR programs and neutrals, and there may be strong pressures on the neutrals to settle a particular case or cases. A neutral's commitment must be to the participants and the process. Pressure from outside of the process should never influence the neutral to coerce parties to settle.
- While neutrals may recommend the services of other professionals, neutrals shall avoid conflicts of interest when making such recommendations.

IV. Competence: Neutrals shall Provide Services Only When They have the Necessary Qualifications to Satisfy the Reasonable Expectations of the Parties.

A, FF, M, NE, SC

Subject to the requirements of any statute or Maryland rule, any person may be selected as a neutral, provided that the parties are satisfied with their qualifications. Training and experience, however, are often necessary. Persons who offer themselves as neutrals give parties and the public an expectation that they have the competency to conduct their ADR processes effectively. In court-connected or any form of mandated ADR, it is essential that neutrals assigned to the parties have the requisite training and experience.

Comments apply to all neutrals:

- Neutrals should have information available for the parties regarding their relevant training, education and experience.
- When neutrals are appointed by a court or institution, the appointing agency shall make reasonable efforts to ensure that each neutral is qualified for the particular ADR process.

V. Confidentiality: A neutral shall maintain confidentiality with certain limited exceptions.

A, FF, M, NE, SC

A neutral shall maintain confidentiality, with certain limited exceptions. Depending upon the ADR process being used, the degree of confidentiality a neutral must maintain may be subject to rules, agreements, statutory obligations, and court orders.

M As required by Maryland Rule 17-109, a mediator, and anyone attending the mediation at the request of a mediator, shall maintain the confidentiality of all mediation communications, which include speech, writing, or conduct made as part of a mediation, including those communications made for the purpose of considering, initiating, continuing, or reconvening a mediation or retaining a mediator. A

mediator, and anyone attending the mediation at the request of a mediator, may not disclose or be compelled to disclose mediation communications in any judicial, administrative or other proceedings.

In addition to any disclosures required by law, mediators may disclose or report mediation communications to a potential victim or to the appropriate authorities to the extent that they believe it necessary to help:

- (1) Prevent serious bodily harm or death; or
- (2) Allege mediator misconduct or defend a mediator against allegations of misconduct.

A mediator may report, if required by a court or other referral source, whether the mediation session took place and whether an agreement was reached.

Mediation communications are not subject to discovery², but information otherwise admissible or subject to discovery does not become inadmissible or protected from disclosure solely by reason of its use in mediation.

A document that reduces to writing an agreement signed by the parties as a result of mediation is not confidential, unless the parties agree in writing otherwise.

A, FF, NE, SC The parties may be permitted to make their own rules with respect to confidentiality or a practitioner or institution may dictate a particular set of expectations.

A, FF, NE, SC Where the parties have agreed that all or a portion of the information disclosed during an ADR process is confidential, the parties' agreement should be respected by the neutral.

Comments apply to all neutrals:

- Since the parties' expectations regarding confidentiality of the process and the written results of the process are important, the neutral should discuss these expectations with the parties at the beginning of the process.
- If the neutral holds private sessions with a party, the nature of these sessions with regard to confidentiality should be discussed prior to undertaking such sessions.
- In order to protect the integrity of the ADR process, a neutral should not communicate information about the parties, their behavior, the merits of their case or settlement offers to the court or other referral source.

- Confidentiality should not be construed to prohibit the effective monitoring, research, or evaluation of ADR programs by responsible persons. Under appropriate circumstances, researchers may be permitted to obtain access to statistical data and, with the permission of the parties, to individual case files, observations, and interviews with participants.
- A neutral cannot ensure the confidentiality of statements parties make to each other or to third persons.

VI. 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, FF, M, NE, SC

A neutral shall work to ensure a quality process and to encourage mutual respect among the participants. 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. The parties decide when and under what conditions they will reach an agreement, be bound by an arbitration award or terminate a neutral.

Comments:

M One of the primary purposes of a mediation is to facilitate the parties' voluntary agreement. This role differs substantially from other professional-client relationships. Mixing the role of a mediator and the role of a professional advising a client is problematic, so mediators must distinguish between the roles. A mediator should, therefore, refrain from providing professional advice.

M A mediator may withdraw from a mediation that will result in an illegal or unconscionable agreement.

M, SF Mediators and settlement conference facilitators should not be guided by a desire for a high settlement rate.

- Neutrals may agree to conduct an ADR process only when they are prepared to commit the attention essential to an effective process.
- Neutrals accepting matters for an ADR process should satisfy the reasonable expectations of the parties concerning the timing of the process. A neutral should not allow a process to be unduly delayed by parties or their representatives.
- The presence or absence of persons depends on the agreement of the parties and the neutral. The parties and neutral may agree that others may be excluded from particular sessions or from the entire process.

- A neutral shall withdraw from an ADR process when incapable of serving or when unable to remain impartial.
- A neutral may withdraw from an ADR process or postpone a session if the process is being used to further illegal or unconscionable conduct, or if a party is unable to participate due to drug, alcohol, or other physical or mental incapacity.

VII. Advertising and Solicitation: A Neutral shall be Truthful in Advertising and Solicitation.

A, FF, M, NE, SC

Advertising or any other communication with the public concerning services offered or regarding the education, training, and expertise of the neutral shall be truthful. Neutrals shall refrain from promises and guarantees of results.

Comments apply to all neutrals:

- It is imperative that communications with the public educate and instill confidence in ADR processes.
- In an advertisement or other communication to the public, a neutral may make reference to meeting state, national, or private organizations' qualifications, only if the entity referred to has a procedure for qualifying neutrals and the neutral has been duly granted the requisite status.

VIII. Fees: A Neutral shall fully Disclose and Explain the Basis of Compensation, Fees, and Charges to the Parties.

A, FF, M, NE, SC

The parties should be provided sufficient information about fees at the outset of an ADR process to determine if they wish to retain the services of a neutral. If a neutral charges fees, the fees shall be reasonable, considering among other things, the service provided, the type and complexity of the matter, the expertise of the neutral, the time required, and the rates customary in the community. In a circuit court referred case, fees may not exceed the maximum allowed by court order. For clarity, a neutral should set down the fee arrangements in a written agreement.

Comments apply to all neutrals:

- A neutral who withdraws from an ADR process should return any unearned fees to the parties.
- A neutral should not enter into a fee agreement which is contingent upon the result of the process or amount of the settlement.
- Co-neutrals who share a fee should hold to standards of reasonableness in determining the allocation of fees.
- While neutrals may refer cases to other ADR practitioners and to other types of service providers, a neutral should not accept a fee for referral of a matter to another neutral or to any other person. This prohibition does not apply to ADR service providers who subcontract with other ADR practitioners or who employ other ADR practitioners.

IX. Obligations to the Process: Neutrals have a Duty to Improve their Skills and Advance the ADR Field.

A, FF, M, NE, SC

Comment applies to all neutrals:

- Neutrals are regarded as knowledgeable in the ADR field, and they have an obligation to use their knowledge to help educate the public about ADR, to make ADR accessible to those who would like to use it, to correct abuses, and to improve their professional skills and abilities.

For More Information: Copies of this document, the ADR Commission's Practical Action Plan, requisite Court Rules, and other information regarding ADR in Maryland can be obtained by calling the Maryland Mediation and Conflict Resolution Office (MACRO) at 410-321-2398 or by visiting MACRO's website at www.courts.state.md.us/adr.html.