Mediator Standards

STANDARDS OF PRACTICE
FOR CALIFORNIA MEDIATORS

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Preface:

The California Dispute Resolution Council (CDRC) is a statewide organization of mediators, arbitrators, and other neutral dispute resolvers whose membership includes representatives from all of the major dispute resolution organizations in California, individual practitioners from all sectors of practice, public and private entities, judges, trainers and academicians.

CDRC has reviewed existing organizational standards and has gathered input from practitioners, program administrators, educators, researchers and others to develop the CDRC Standards of Practice for California Mediators. These Standards were developed in collaboration with all of the major dispute resolution organizations and individuals throughout the State. These Standards of Practice are intended to guide mediators and providers in the State of California.

Preamble:

The purposes of the CDRC Standards of Practice for California Mediators are to:

- Provide model standards of conduct;
- Inspire excellence in practice;
• Guide mediation participants, educators, policymakers, courts, government organizations and others in establishing policies and practices for mediation programs;

• Provide a foundation for any mediation credentialing program that may be contemplated by specifying conduct that helps to define ethical, competent, appropriate and effective dispute resolution; and,

• Promote public understanding and confidence in mediation.

In order for mediation to be effective, there must be broad public confidence in the integrity and fairness of the process. Every mediator bears the responsibility of conducting mediations in a manner that instills confidence in the process, promotes trust in the integrity and competence of mediators, and handles disputes in accordance with the highest ethical standards.

In applying these Standards to specific behavior, the context must always be considered. Context includes the social and cultural setting, the participants’ relationship, the nature of the dispute, and any other factors that may help to determine an appropriate mediation process for the particular matter. A practice appropriate in one context may be inappropriate in another. These Standards of Practice are intended to apply across all types, styles, and contexts of mediation.

Definitions:

“Mediation” is a process in which a neutral person or persons facilitates communication and negotiation between the disputants to assist them in reaching a mutually acceptable agreement, or a better understanding of each participant’s interests, needs, values, and options.

“Mediator” is a person or persons who conduct mediation. In these Standards, all persons acting in this role are called “mediators” although, in some cases, their titles may be “ombudspersons”, “facilitators”, “intermediaries”, “neutrals”, or a similar title. “Mediator” includes any person designated by a mediator either to assist in the mediation or to communicate with the participants in preparation for a mediation.

“Participant” is any individual taking part in a mediation.

“Party” is an individual, entity or group taking part in a mediation as a disputant and all of that disputant’s respective advocates, representatives and consultants.

“Provider” is any individual or organization administering mediation services, which might include but not be limited to providing communication between a person and a Mediator for the purpose of initiating, considering or convening a mediation, or retaining a Mediator.

Standards of Practice:

Section 1: Voluntary participation and self-determination.

Mediation is based upon the principle of self-determination by the parties, and relies on the parties to reach a
voluntary, consensual agreement. While the responsibility for conducting the mediation process rests with the Mediator in consultation with the parties, responsibility for the resolution of a dispute rests with the parties.

While participants may be mandated to the mediation process, a Mediator may not mandate the extent to which any participant must participate in the process. A Mediator should explain to the participants that the participation of all decision-makers is critical; however, any participant may withdraw from mediation at any time.

Section 2: Impartiality, bias and disclosure.

A Mediator shall not mediate a matter in which he or she cannot do so without impartiality. A Mediator should be committed to assisting all parties in an impartial manner. Parties may consent to use a Mediator’s services after a disclosure of any known grounds which might reasonably raise a question about the Mediator’s impartiality.

A. Disclosing potential partiality:

A Mediator should identify and disclose potential grounds upon which a mediator’s impartiality might reasonably be challenged. Such disclosure should be made prior to the start of a mediation and in time to allow the parties to select an alternate mediator. Such disclosure should include the identification of any previous selection(s) as a neutral by any party during the prior three years (“Case Experience”), and any known current or past personal or professional relationship or affiliation with any participant which might reasonably raise a question as to the Mediator’s impartiality (“Relationships”).

A Mediator should resolve all doubts in favor of disclosure. All disclosures should be made as soon as practical after the Mediator becomes aware of the interest or relationship. The duty to disclose is a continuing obligation. A Mediator should encourage each participant to make a similar effort to disclose any Case Experience or Relationships with the Mediator.

B. Dealing with issues of impartiality:

Immediately upon becoming aware of any reasonable concern regarding the Mediator’s impartiality, the Mediator should provide the participants with an adequate opportunity to explore the matter. If a party asks a Mediator to withdraw prior to the commencement of a mediation, or thereafter upon newly disclosed relationship information, the Mediator must do so. If a participant raises a question about a specific interest or relationship, the Mediator should proceed only after all participants consent.

If a Mediator determines that an interest or relationship of his or hers casts doubt on the integrity of the process, or if the Mediator becomes incapable of maintaining impartiality, the Mediator shall withdraw. If the parties expressly request in writing that the Mediator continue to provide services despite the disclosure, the Mediator may elect to do so.

C. Disclosures when a Neutral is to use more than one dispute resolution process:

When more than one dispute resolution process is contemplated (e.g. med-arb), the neutral must clearly define the different procedures, define the neutral’s role in each procedure, advise the participants of the consequences of revealing information during any one procedure, and obtain written consent to serve in a dual capacity. If the neutral has acted as a Mediator, he or she should afford the parties an opportunity to select another neutral if they wish to engage in another process. The neutral must advise the participants when he or she is moving from one procedure to another.
D. A Mediator has a continuing duty to disclose and avoid appearances of partiality:

A Mediator shall not use the dispute resolution process to solicit, encourage or otherwise procure any other relationship with any participant. A Mediator shall not personally profit from, or otherwise exploit information acquired through mediation for personal gain. Without the consent of all parties, a Mediator shall not establish a professional relationship with one of the parties, either during the mediation, or after the mediation for a period of three years in a related matter, or in an unrelated matter which would raise legitimate questions about the integrity of the mediation process.

Section 3: Standards for conducting a mediation:

A Mediator shall conduct mediation in an impartial and ethical manner by providing a balanced process in which each participant is given an opportunity to participate. A Mediator may encourage the participants to identify their interests and evaluate options for resolution in a collaborative, non-adversarial manner.

In an attempt to reach an informed, voluntary agreement, appropriate Mediator behavior may include, but is not limited to, providing information about the process, addressing obstacles to communication, assisting the participants in defining the issues, providing impartial substantive information, exploring alternatives for resolution, and building the capacity of the parties to make an informed decision.

Subject to duties of nondisclosure of confidential information, a Mediator is obligated to be truthful, and should allow participants the opportunity to consider all proposed options. A Mediator may terminate the mediation if, in the Mediator’s judgment, further discussions would be unproductive.

Mediation is not the practice of law. A Mediator may generally discuss a party’s options including a range of possible outcomes in an adjudicative process. At the parties’ request, a Mediator may offer a personal evaluation or opinion of a set of facts as presented, which should be clearly identified as such. A Mediator should not give any participant legal or other professional advice. A Mediator should encourage participants without legal representation to seek independent legal advice before signing any legally binding agreement. If a Mediator believes that the participants may not be capable of participating in informed negotiations, or if a Mediator is asked for professional advice other than relating to the mediation process, the Mediator should suggest that the participants seek advice from appropriate resources. A mediator must disclose in writing any personal or financial interest or relationship if recommending the services of specific professionals.

If a Mediator believes that the continuation of the process would harm any participant or a third party (such as children in a marital dissolution matter), or that the integrity of the process has been compromised, then the Mediator shall inform the parties and shall discontinue the mediation, without violating the obligation of confidentiality.

Section 4: Confidentiality.

Confidentiality in Mediation is important to encourage all participants to speak truthfully and candidly, to enable a full exploration of issues in dispute, and to reach a complete and satisfactory resolution. Confidentiality is governed by law in California Evidence Code Sections 1115-1128 and applied ethical standards.
A. Confidentiality of a Mediation.

A Mediator shall preserve and maintain the confidentiality of all mediation proceedings except where required by law to disclose information. If a Mediator or the law has established specific exceptions to the general rule of confidentiality, these exceptions must be disclosed to the participants prior to reaching an agreement to mediate. When case information is published or made public without the permission of all parties, a Mediator shall render anonymous all identifying information.

B. Confidentiality within the mediation process.

If a Mediator speaks privately with any participant(s) during the mediation, the Mediator shall first discuss with all participants his or her policy regarding confidentiality for individual communications with the participants. A Mediator shall not disclose information to the other participants when confidentiality is requested.

C. Mediator reporting.

The mediation process must rely upon the ability of the parties to reach a voluntary, uncoerced agreement. No mediator shall submit or threaten to submit to a court or other adjudicative body any report, assessment, evaluation, recommendation, or finding of any kind by the mediator concerning the mediation which that mediator conducted, unless all participants in the mediation expressly agree in writing to permit a broader report or statement. Where required by law or local court rule, reporting should be permitted only as to whether the parties did or did not fully resolve their dispute, unless all participants expressly agree otherwise.

Section 5: Competence.

Measurement of Mediator competence should be based upon dispute resolution training, experience and performance. Mediator competence is not defined by academic degrees or professional licenses. Use of any degree or license as a criterion for determining competence could restrict competent persons from serving as a Mediator. The freedom of disputants to select their own Mediator should not be denied by restricting that choice, as any restriction would be inconsistent with mediation’s voluntary nature and would deprive disputants of access to Mediators with a rich diversity of occupational backgrounds and mediation styles. If asked by any participant, a Mediator should provide to all participants information on his or her mediation training, education, and mediation experience, as well as the guidelines proposed for the mediation.

A Mediator shall mediate only when he or she has the necessary skills to satisfy the reasonable expectations of the parties. A Mediator should possess the skills, knowledge and ability to adapt to the context of the dispute, facilitate communication, assist the parties in developing options, and discuss alternatives with participants. A Mediator should possess the awareness and experience to assess when he or she (a) is unable to render adequate mediation services, or (b) cannot meet the participants’ reasonable expectations. In those cases, the Mediator should decline the engagement or withdraw from the mediation.

Every Mediator is personally responsible for his or her professional growth. A Mediator should endeavor to continually improve and increase his or her knowledge about the practice of mediation and developments in relevant substantive fields through continuing education, consultation, peer review, and user feedback.

Assessing effective mediation should be a shared responsibility among practitioners, professional organizations, educators, programs and participants. No assessment should be limited to a single mode such as resolution rates.
Section 6: Marketing and compensation.

A Mediator shall be truthful and accurate in marketing mediation services and shall not promise nor guarantee results.

A Mediator is entitled to reasonable compensation for his or her services. Prior to a mediation, the Mediator must disclose all applicable fees, charges, and costs. A Mediator shall not charge a fee contingent upon the outcome of the mediation. A Mediator is encouraged to consider providing pro bono or reduced fee services in instances where the participants do not have the ability to pay for mediation services.

Except for fees directly related to mediation services provided, a Mediator must not solicit, accept or exchange any fee, gift or favor of significant value with any participant or their affiliate in any pending, scheduled or concluded mediation for a reasonable time. A Mediator must use judgment that reflects the high ethical standards the field requires.