

Ethical Duties of a Mediator

W h a t A B A O p i n i o n 5 1 8 M e a n s f o r M e d i a t o r s

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The Basics: Key Rules

Model Standards of Conduct for Mediators

Set of tenets which have been adopted by the American Bar Association (ABA), American Arbitration Association (AAA), and the Association of Conflict Resolution

United States District Court Eastern District of Missouri Local Rules

Set of local rules with Federal Rule References. Rule 6, Alternative Dispute Resolution, correlates to Federal Rule of Civil Procedure 16

Select Rules from the Model Rules of Professional Conduct

Set of both imperative and permissive rules for lawyers. Certain rules address lawyers serving as third-party neutrals.

Model Standards of Conduct for Mediators

Standard I. *Self-Determination*

Standard II. *Impartiality*

Standard III. *Conflicts of Interest*

Standard IV. *Competence*

Standard V. *Confidentiality*

Standard VI. *Quality of the Process*

Standard VII. *Advertising and Solicitation*

Standard VIII. *Fees and Other Charges*

Standard IV. *Advancement of Mediation Practice*

Self-Determination & Impartiality

- Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to the process and the outcome. **Mediator shall not undermine party self-determination.**
- **Mediator shall conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality.** A mediator should not act with partiality based on any participant's personal characteristics, background, etc.

Model Standards of Conduct for Mediators

Conflicts of Interest

Standard III

Model Standards of Conduct for Mediators

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

Rule 6.03(D)(1)

United States District Court Eastern District of Missouri Local Rules

The term “conflict of interest” as used in this rule means any direct or indirect financial or personal interest in the outcome of a dispute, or any existing or prior financial, business, professional, family or social relationship with any participant in an ADR process that is likely to affect the neutral's impartiality or reasonably create an appearance of partiality or bias.

Confidentiality

Standard V

Model Standards of Conduct for Mediators

Mediator shall maintain the confidentiality of all information obtained in mediation, unless otherwise agreed to by the parties or required by applicable law.

Rule 6.04

United States District Court Eastern District of Missouri Local Rules

ADR proceedings are private and confidential. A neutral may exclude all persons other than the named parties and their counsel from ADR conferences. All written and oral communications made or disclosed to the neutral are confidential and may not be disclosed by the neutral, any party, or other participant, unless the parties otherwise agree in writing. Neutral must not testify regarding matters disclosed during ADR proceedings.

Quality of Process

Standard VI

Model Standards of Conduct for Mediators

A mediator shall conduct a mediation in a manner that promotes diligence, timeliness, safety, presence of the appropriate participants, party participation, procedural fairness, party competency, and mutual respect among all participants. If a mediator believes that participant conduct jeopardizes conducting a mediation consistent with these Standards, a mediator shall take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.

Rule 6.05(A)

United States District Court Eastern District of Missouri Local Rules

A neutral must report to the judge any willful or negligent failure to attend any ADR conference, to substantially comply with the Order Referring Case to Alternative Dispute Resolution, or otherwise participate in the ADR process in good faith. (Rule 6.02(C) sets out duties of participants).

Model Rules of Professional Conduct

Rule 2.4(B)

A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When a lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as the third-party neutral and a lawyer's role as one who represents a client.

Model Rules of Professional Conduct

Rule 4.1

In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person; or
- (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Rule 4.1 – Comment 2

[2] . . . Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.

Model Rules of Professional Conduct Rule 8.4 (c)

It is professional misconduct for a lawyer to:

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation; . . .

ABA Formal Opinion 518 - Generally

- Addresses mediator conduct and distinguishes mediator conduct with the advocate's
- Lawyer's duties to avoid misleading communications when acting as a third-party neutral mediator
- The lawyer-mediator's duties under Model Rule 2.4 when serving as third-party neutral
- The lawyer-mediator's duty to avoid statements that imply that the lawyer mediator is not neutral but is seeking to achieve a party's best interest

Opinion 518 - Misleading Parties & the Mediator's Role

The obligation to avoid misleading the parties about the lawyer-mediator's role also means that, in conducting the mediation, the lawyer should not state that the lawyer-mediator is acting to achieve a party's best interest or that a proposed settlement is in a party's best interest.

Opinion 518 & Legal Advice

. . . [I]f the give-and-take in a mediation includes a discussion of how the law applies to the parties' dispute, the lawyer-mediator should avoid communicating in a manner that might be taken as rendering legal advice, or otherwise suggesting to a mediation party that the lawyer-mediator's role is to protect or advance a party's legal interests or to help the party to attain a particular desired result.

Opinion 518 and Rule 8.4

Rule 8.4(c) prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. . . .

Lawyer-mediators have an ethical duty under Rule 8.4 (c) to avoid engaging in conduct that is dishonest, fraudulent, deceptive, or misleading.

Rules 4.1, 8.4 (c) & The Role of Advocate

Statements regarding negotiating goals or willingness to compromise ordinarily are not considered statements of material fact within the meaning of the Rules. Thus, a lawyer may downplay a client's willingness to compromise or present a client's bargaining position without disclosing the client's "bottom line" position, in an effort to reach a more favorable resolution.

Rule 4.1 Application to 518

Lawyers representing negotiating parties have leeway to make immaterial false statements under Rule 8.4(c) and Rule 4.1.

HOWEVER

A lawyer-mediator does not have the same leeway because a lawyer-mediator serves as a third-party neutral under Rule 2.4.

Some Key Points . . .

As an attorney-mediator

- Don't lie or mislead;
- Be clear about your role as mediator/neutral, and stay in that role;
- You can provide legal information but may not give legal advice, say or do anything that may suggest that you are working in a party's best interest, or advise a party what they should do;
- A mediator's proposal is OK, depending on how it's presented

Questions?

Thank you!

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