Model Standards of Conduct for Mediators (2005)

I. INTRODUCTION

Since the mid-1970's, alternative dispute resolution (ADR), a term that encompasses negotiation, mediation, arbitration, and hybrids of the three processes, has met and surpassed skepticism that it is only for starry-eyed individuals who sit around and sing Kum-Ba-Yah.[1] In addition to relieving overloaded court dockets, ADR saves litigants time[2] and money.[3] ADR tends to preserve relationships and provide "more creative, particularized, flexible and participative solutions" than its adversarial counterpart.[4] Realizing its many benefits, in 1998, Congress required all federal courts to establish ADR

---

[1] In 1976, Professor Frank Sander helped forever change the landscape of the American justice system by stating that "[w]ith respect to many problems, there is a need for developing a flexible mechanism that serves to sort out the large general question from the repetitive application of a settled principle. I do not believe that a court is the most effective way to perform this kind of sifting task." Sander went on to discuss criteria (such as the nature of the dispute, the relationship between the disputants, amount in dispute, cost, and speed) for determining how particular conflicts should be settled through ADR. Frank E. A. Sander, Professor of Law, Harvard University, Varieties of Dispute Processing, Address Given at the National Conference on Causes of Popular Dissatisfaction with the Administration of Justice (1976), *reprinted in* THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE 65, 73, 72–79 (Leo Levin & Russell Wheeler eds., 1979); *see generally* Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Re-Shaping Our Legal System*, 108 PENN. ST. L. REV. 165 (2003) (offering an incredibly comprehensive history of the ADR movement in the United States).

[2] Michael E. Weinzierl, *Wisconsin's New Court-Ordered ADR Law: Why it is Needed and its Potential for Success*, 78 MARQ. L. REV. 583, 587–88 (1995). Because ADR is typically more informal and sometimes administered independently of the courts, ADR sessions can usually be scheduled within days or weeks of the party's request. *Id.*

[3] Harry N. Mazadoorian, *Practice Experience is Solid Evidence of ADR's Effectiveness*, NAT'L L.J., Apr. 11, 1994, at C10. A study of major civil cases found that by using ADR, each party saved approximately $800,000 per dispute. *Id.*

[4] Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities*, 38 S. TEX. L. REV. 407, 417 (1997).

programs[5] and many state courts followed suit. ADR has become so commonplace that it is "simply part and parcel of the legal practice."[6]

Mediation, a form of ADR and a kaleidoscope in itself, may generally be defined as a process in which "[a neutral] third party who has . . . no authoritative decisionmaking power . . . [assists disputing] parties in voluntarily reaching their own mutually acceptable" agreement.[7] Since its formal inception in 1913,[8] mediation has experienced exponential growth and now cuts across several different disciplines.[9] Modern-day mediators not only facilitate in a wide variety of contexts, but they come from all walks of life.[10] As the profession grew, so did the number of ethical quandaries. Mediators, for example, began to wonder: are all matters discussed during a mediation confidential unless consent is given by the parties or do mediators have a higher duty to report in specific instances? May mediators accept unequal payments from the disputants? And, of course, the age old question—is a mediator's chief role to facilitate, evaluate, or transform?

In essence, by the 1990's, the "romantic days of ADR [appeared] to be over."[11] Ethics and standards of practice were needed to guide practitioners and to "insure [mediation's] legitimacy against a variety of theoretical and practical challenges."[12] Rules of professional conduct were in place for attorneys, but those did not provide adequate structure—because not all mediators were attorneys. Second, even for the mediators who *were*

---

[5] "Each United States district court *shall* authorize . . . the use of alternative dispute resolution processes in all civil actions." 28 U.S.C.A. § 651(b) (West Supp. 2005) (emphasis added).

[6] Douglas H. Yarn, *Lawyer Ethics in ADR and the Recommendations of Ethics 2000 to Revise the Model Rules of Professional Conduct: Considerations for Adoption and State Application*, 54 ARK. L. REV. 207, 212 (2001).

[7] CHRISTOPHER W. MOORE, THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT 15 (2 ed. 1996).

[8] In 1913, the U.S. Department of Labor was established to settle disputes between labor and management. *See* Pamela A. Kentra, *Hear No Evil, See No Evil, Speak No Evil: The Intolerable Conflict for Attorney-Mediators Between the Duty to Maintain Mediation Confidentiality and the Duty to Report Fellow Attorney Misconduct*, 1997 B.Y.U. L. REV. 715, 719 (1997) (providing a brief history of mediation in the United States).

[9] *Id.* at 719 n.9 (explaining that mediation is frequently used within the family, criminal, labor and employment, corporate, and health law contexts).

[10] There are certainly many lawyer-mediators, but non-lawyers, such as psychologist-mediators and general community members, are also a vital component to the profession. *See* Robert P. Schuwerk, *Reflections on Ethics and Mediation*, 38 S. TEX. L. REV. 757, 761–62 (1997) (discussing important reasons to encourage the participation of non-lawyer mediators).

[11] Menkel-Meadow, *supra* note 4, at 408.

[12] *Id.*

attorneys, dilemmas were not necessarily answered by then-existing attorney codes of conduct because of fundamental differences between the two professional spheres. "Rules premised on adversarial and advocacy systems . . . simply [did] not respond to [ADR] processes which [were] intended to be conducted differently (in forms of communication, in sharing of information, in problem analysis and resolution) and to produce different outcomes."[13]

Recognizing that mediation is a different sort of process and not a "combat to be won,"[14] many organizations and institutions formulated ethical guidelines for the broader population of mediators, whether lawyers or not. In 1994, one of the most prominent of those sets—the Model Standards of Conduct for Mediators—was developed (hereinafter Model Standards (1994)).[15] Part II of this Recent Development discusses the history of the Model Standards (1994) and its subsequent revisions. Part III delineates the major differences between the Model Standards (1994) and the Model Standards (2005) and presents a detailed overview of the Model Standards as they currently stand. Part IV contemplates the revised Model Standard's implications and raises lingering questions.

II. HISTORY OF THE MODEL STANDARDS

In 1992, representatives from the American Arbitration Association (AAA), the American Bar Association's Section of Dispute Resolution (ABA-ADR), and the Society of Professionals in Dispute Resolution[16] formed a Joint Committee to develop some sort of code of conduct for

---

[13] *Id.* at 410; *see also id.* at 430 (stating that "[t]rust, confidentiality, creativity and openness may suggest different ethical precepts"); *see also* Yarn, *supra* note 6, at 213–14 ("ADR ethics constitute a professional ADR standards regime governing neutrals that is separate and distinct from the professional legal standards regime governing lawyers."). A consequence of two separate standards is that lawyer-neutrals must adhere to both, with the possibility of being subjected to two penalties "for one iniquitous act." *Id.* at 216; *see also* Madeleine H. Johnson, Note, *What's a Mediator to Do? Adopting Ethical Guidelines for West Virginia Mediators*, 106 W. VA. L. REV. 177, 180 (2003).

[14] John D. Feerick, *Toward Uniform Standards of Conduct for Mediators*, 38 S. TEX. L. REV. 455, 458–59 (1997) (citing Tom Arnold, *Why ADR, in* ALTERNATIVE DISPUTE RESOLUTION (ADR): HOW TO USE IT TO YOUR ADVANTAGE!, 13, 15 (ALI-ABA 1996).

[15] Johnson, *supra* note 13, at 185–86.

[16] Please note that in 2001, the Society of Professionals in Dispute Resolution merged with the Academy of Family Mediators and the Conflict Resolution Education Network to form the Association for Conflict Resolution (ACR). *See* Association for Conflict Resolution Frequently Asked Questions, http://www.acrnet.org/about/ACR-FAQ.htm (last visited Sept. 27, 2005).

mediators.[17] The Joint Committee, during its two-year expedition, turned to many states' existing codes of ethics for neutrals,[18] as well as other organizations' mediator and arbitrator codes.[19] The result of the Joint Committee's hard work was the well-respected Model Standards (1994).[20] This section gives a brief summary of the Model Standards (1994), as well as a description of its evolution.

A. *Model Standards (1994)*

The function of the Model Standards (1994) was three-fold: (1) "to serve as a guide for the conduct of mediators;" (2) "to inform the mediating parties;" and (3) "to promote public confidence in mediation."[21] Mediation was defined as a "process in which an impartial third party—a mediator—facilitates the resolution of a dispute by promoting voluntary agreement (or "self-determination") by the parties to the dispute."[22] The Standards' body was divided into nine sections that covered the following topics: self-determination; impartiality; conflicts of interest; competence; confidentiality; quality of the process; advertisements and solicitation; fees; and obligations to the mediation process. Each of the standards pronounced "a broad principle so as to encompass varying situations and [included] descriptive comments, stated both generally and specifically."[23]

In efforts to be as inclusive as possible, the Standards did not draw a distinction between the lawyer-mediator and other professional mediators.[24] Likewise, the Model Standards (1994) was to apply to "all types of mediation."[25] While the Model Standards (1994) notes that it "may be affected by laws or contractual agreements," the 1994 version does not offer

---

[17] *See* Feerick, *supra* note 14, at n.8 (listing the individuals who formed the original Joint Committee).

[18] The states included Florida, Hawaii, Texas, Colorado, and Oregon. *Id.* at 459.

[19] For example, the Joint Committee looked at codes drafted by the Academy of Family Mediators and the Center for Dispute Settlement at the Institute of Judicial Administration. *Id.*

[20] AAA-ABA-SPIDR MODEL STANDARDS OF CONDUCT FOR MEDIATORS (1994), *reprinted in* DISPUTE RESOLUTION ETHICS: A COMPREHENSIVE GUIDE 257 (Phyllis Bernard & Bryant Garth eds., 2002) [hereinafter MODEL STANDARDS (1994)].

[21] MODEL STANDARDS Preface (1994), *supra* note 20, at 257.

[22] *Id.*

[23] Feerick, *supra* note 14, at 460; *see also id.* at 460–77 (providing an in-depth analysis of the MODEL STANDARDS (1994)).

[24] *Id.* at 459.

[25] MODEL STANDARDS Introductory Note (1994).

a quick fix for mediators facing that conundrum.[26] Similarly, the Standards did not prescribe a certain punishment for a mediator's failure to adhere to them.[27]

B. *A Need for Revision*

The Model Standards (1994), as a whole, met great success. Many states adopted it in whole or at least used the 1994 version as a template to form their own ethical codes for mediators.[28] In addition, several educational texts referenced the Standards when discussing appropriate mediator conduct.[29] With the proliferation of mediation, though, came several questions and even some criticism.[30] Having never claimed to be perfect, the Standards openly admitted that it was "a beginning, not an end."[31] As the profession surged forward, representatives from the drafting organizations deemed it essential to move with the times.

In September 2002, a Joint Committee assembled to initiate its review of the Model Standards (1994) and to assess whether changes were warranted.[32] From the beginning, the Joint Committee repeatedly emphasized its

---

[26] *Id.* Since the Standards were intended to be a general framework for the practice of mediation rather than a list of answers, it can be expected that the mediator in that or in another type of dilemma, was to resolve it within the spirit of the Standards.

[27] Schuwerk, *supra* note 10, at 759. It can be assumed, though, that lawyer-mediators and other professional mediators who had another applicable code of conduct were still subject to those codes' penalties.

[28] These states included Alabama, Arkansas, California, Georgia, Kansas, Louisiana, and Virginia. Joseph B. Stulberg, Reporter's Notes n.2 (Apr. 10, 2005), http://moritzlaw.osu.edu/dr/msoc/pdf/reportersnotes-april102005final.pdf (last visited Sept. 27, 2005) [hereinafter Reporter's Notes].

[29] *Id.* at n.3.

[30] Professor Menkel-Meadow expressed concerns that the Standards were "too broad and ambiguous in the particular areas which need texture and detail, by virtue of the complexity of the tasks involved (i.e., conflicts, advice giving, and evaluation)." Menkel-Meadow, *supra* note 4, at 451. Some have gone so far as to argue that the 1994 version is "uninformative to mediation consumers and unhelpful to mediators." Jamie Henikoff & Michael Moffitt, *Practitioners' Corner: Remodeling the Model Standards of Conduct for Mediators*, 2 HARV. NEGOT. L. REV. 87, 87 (1997).

[31] MODEL STANDARDS Introductory Note (1994), *supra* note 20, at 257.

[32] The Joint Committee was comprised of two individuals from each of the original participating organizations. Eric P. Tuchman and John H. Wilkinson represented the AAA; R. Wayne Thorpe and Susan M. Yates came from the ABA-ADR; Sharon B. Press and Terrence T. Wheeler came on behalf of ACR. Reporter's Notes, *supra* note 28, at 1–2. The Joint Committee also appointed Joseph B. Stulberg as its Reporter to assist them. *Id.* at 3.

collective admiration for the efforts of those who drafted the 1994 version.[33] This is accurately reflected in the fact that as part of its "Guiding Principles," the Joint Committee declared that the three major functions of the 1994 version should remain unchanged, the basic architecture of the 1994 version should be retained, and changes to concept should be made only to "correct, clarify, or respond to new developments."[34]

When planning for the road ahead, the Joint Committee made a conscious decision not to have a closed-door review process and, instead, to readily receive valuable input from the "various publics interested in and affected by the practice of mediation."[35] In line with that objective, the Joint Committee's Reporter "sent letters of invitation to over fifty dispute resolution organizations requesting them to designate a liaison," the Committee held numerous public forums on the Model Standards' revisions, and the Committee established a website to urge comments on and reactions to its activities from practitioners.[36]

The Joint Committee posted a proposed revised Model Standards in January 2004.[37] After funneling through a great deal of public commentary on the first draft and engaging in extensive conference calls, the Joint Committee posted another version in September 2004.[38] The Joint

---

[33] After surveying numerous other codes and standards, the Joint Committee declared that the original drafters "served the public elegantly by providing a comprehensive, useable document." *Id.* at 4–5. Even though some revisions to the document were found to be necessary, the revisions were most likely a result of the evolving practice of mediation rather than the drafters' oversight.

[34] *Id.* at 2. Drastic modifications indeed faced an uphill battle, as each potential one had to be unanimously supported by the Joint Committee members prior to being implemented. *Id.*

[35] *Id.*

[36] *Id.* at 3.

[37] *Id.*; *see also* Joint Committee, Draft, REVISED STANDARDS OF CONDUCT FOR MEDIATORS (Jan. 2004), http://moritzlaw.osu.edu/dr/msoc/pdf/jan_draft.pdf (last visited Sept. 27, 2005) [hereinafter REVISED STANDARDS (Jan. 2004)]. Comparing the Revised Standards (Jan. 2004) with the original Model Standards (1994), there were three significant changes. The January 2004 version: (1) formed a title for each Standard and stated the Standard in declarative sentences that guided *mediator* conduct; (2) utilized footnotes for various purposes, including defining relevant terms and interpreting potential conflicts; and (3) noted that the Reporter's Notes would summarize and clarify matters. Reporter's Notes, *supra* note 28, at 5.

[38] Reporter's Notes, *supra* note 28, at 4; *see also* Joint Committee Draft, MODEL STANDARDS OF CONDUCT FOR MEDIATORS (Sept. 2004), http://moritzlaw.osu.edu/dr/msoc/pdf/sep_draft.pdf (last visited Sept. 27, 2005) [hereinafter MODEL STANDARDS (Sept. 2004)]. The September 2004 draft made the following progressions: (1) due to confusion over their authoritative weight, eliminated all footnotes, except one that stated that no participating organization had yet to adopt the

Committee received comments for approximately sixty days, made the revisions it deemed proper, and produced what it intended to be the final draft in December 2004.[39] However, due to important and constructive suggestions from constituents, some alterations were made. In April 2005, the Joint Committee unanimously recommended the document to its respective organizations, more comments were reviewed, and the Joint Committee shortly thereafter developed the final version of the revised Model Standards.[40]

III. MODEL STANDARDS OF CONDUCT (2005)

The ABA House of Delegates approved the Model Standards (2005) on August 9, 2005, the Association for Conflict Resolution (ACR) Board of Directors approved the Standards on August 22, 2005, and the AAA approved them on September 8, 2005.[41] One of ACR's representatives, Sharon Press, stated that the unanimous adoption is a "very important step for the field of conflict resolution."[42]

A. *Major Changes in Format*

Through its own investigation and by listening to and evaluating public commentary on its numerous drafts, the Joint Committee adopted six general principles that are manifested in the Model Standards' (2005) structure. First, rather than pronouncing the mediator's obligations at the outset as the Model Standards (1994) had done, the Model Standards (2005) separates the

---

Model Standards (Sept. 2004) and one that articulated that the Standards apply to co-mediator models and (2) suggested that the Reporter's Notes serve as the Standards' legislative history. Reporter's Notes, *supra* note 28, at 5–6.

[39] *Id.* at 4; *see also* MODEL STANDARDS OF CONDUCT FOR MEDIATORS (Dec. 2004), http://moritzlaw.osu.edu/dr/msoc/pdf/dec2004_draft_final.pdf (last visited Sept. 27, 2005) [hereinafter MODEL STANDARDS (Dec. 2004)]. The December 2004 draft: (1) determined that the final Standards would stand as an independent document, with the Reporter's Notes maintaining a completely separate, albeit educational role; (2) chose to remove the organizational difference between the Standards and Comments; and (3) included "explicit provisions directed at considerations of interpretative construction." Reporter's Notes, *supra* note 28, at 6.

[40] *Id.* at 4. *See also* MODEL STANDARDS OF CONDUCT FOR MEDIATORS (Sept. 2005), *at* http://www.moritzlaw.osu.edu/dr/msoc/pdf/standards-090805.pdf (last visited Feb. 1, 2006) [hereinafter MODEL STANDARDS (2005)].

[41] Press Release, Association for Conflict Resolution, Association for Conflict Resolution Board of Directors Adopts Model Standards of Conduct for Mediators (Aug, 23, 2005), *at* http://www.acrnet.org/about/pressreleases/pr-mdc082305.htm.

[42] *Id.*

Standards' title from the Standards' substance.[43] Second, the Standards' substance is divided into enumerated paragraphs and sub-paragraphs.[44] Third, since all entries were to have meaning, the confusing "hanging paragraphs" located in the Model Standards (1994) were eliminated.[45] Fourth, the categorical distinction between the Standards and its "Comments" was erased and subsequently, the Standards now distinguish the level of guidance provided to the mediator by using either "shall" or "should."[46] Fifth, the Standards now *solely* guide mediator conduct (and therefore, do not aim to regulate the disputing parties' behavior).[47] Sixth, guidance is provided to the mediator for appropriate action in the face of conflicting Standards.[48]

B. *Substance of the Model Standards (2005)*

The Model Standards (2005) begins by offering a brief history of the Standards. The revised version substitutes a *Preamble* and *Note on Construction* for the Model Standards' (1994) "Introductory Note" and "Preface." The Standards maintain the original version's same basic architecture of nine standards, yet altered the substance as detailed below.

1. *Preamble*

The *Preamble* acknowledges the recent expansion of mediation by stating that it is "used to resolve a broad range of conflicts within a variety of settings."[49] The Standards' three goals remain constant,[50] but the definition of mediation was revised to reflect the overarching importance of party self-determination.[51] Mediation, it states, is a "process in which an impartial third

---

[43] Reporter's Notes, *supra* note 28, at 4.

[44] *Id.*

[45] *Id.*

[46] *Id.*; *see also infra* note 54.

[47] *Id.*

[48] *Id.*

[49] MODEL STANDARDS (2005), *supra* note 40, at 2. Mediation's many purposes include allowing parties to clarify issues, understand new perspectives, identify interests, explore options, and reach mutually agreeable solutions if so desired. *Id.*

[50] *See supra* note 21.

[51] Reporter's Notes, *supra* note 28, at 7. Another reason the Joint Committee altered the definition of mediation was to respond to the raging debate in the mediation world over facilitative versus evaluative mediation. *Id.* Facilitative mediation functions on the premise that the disputing parties are in a better position to understand and identify their interests and, therefore, the mediator is merely present to facilitate the disputants'

party facilitates communication and negotiation and promotes voluntary decision making by the parties to the dispute."[52]

2. *Note on Construction*

The *Note on Construction* first states that the different standards are to be "read and construed in their entirety," with no significance being given to order.[53] Next, the terms "shall" and "should" are defined so that mediators may understand the level of obligation they must attach to each custom.[54] Although the moment at which a mediation commences and ceases may be important in some contexts, the Joint Committee refused to provide precise definitions for those often ambiguous times.[55]

The *Note* then, elaborating on the original Standards' mentioning of potential conflicts, explicitly acknowledges that a mediator's conduct may very well be affected by and have to give way to "applicable law, court rules, regulations, other applicable professional rules, mediation rules to which the parties have agreed and other agreements of the parties."[56] In that situation, the mediator is still to "make every effort to comply with the spirit and intent of [the] Standards" and honor all standards that are not in conflict.[57]

---

discussions. During an evaluative mediation, on the other hand, the mediator may and is encouraged to play a more active role by giving advice, making assessments, and even predicting outcomes. Murray S. Levin, *The Propriety of Evaluative Mediation: Concerns About the Nature of an Evaluative Opinion*, 16 OHIO ST. J. ON DISP. RESOL. 267, 268–69 (2001). Proponents of evaluative mediation argue that the parties deserve to have all relevant, available information before them. John Bickerman, *Evaluative Mediator Responds*, 14 ALTERNATIVES TO HIGH COST LITIG. 70, 70 (1996); *but see* Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937, 939 (1997) (explaining that among other problems, evaluation reduces mediator impartiality and disputant self-determination). On the facilitative to evaluative continuum, the Standards' revised definition of mediation, although it is "not designed to exclude any mediation style," seems to fall on the facilitative side, as the mediator's approach must be "consistent with Standard I's commitment to support and respect the parties' decision-making roles." Reporter's Notes, *supra* note 28, at 7.

[52] MODEL STANDARDS Preamble (2005).

[53] MODEL STANDARDS Note on Construction (2005).

[54] *Id.* "Shall" prescribes mandatory mediator conduct. "Should" indicates that although the practice is "not required," it is still "highly desirable" and is to be departed from "only for very strong reasons." *Id.*

[55] Reporter's Notes, *supra* note 28, at 8.

[56] MODEL STANDARDS Note on Construction (2005), *supra* note 53.

[57] *Id.* For example, a mediator may determine that a court's rule of reporting participant non-attendance takes precedence over Standard I's insistence that the neutral conduct a mediation based on party self-determination in regards to participation. There,

Lastly, the *Note on Construction* explains that while the Model Standards (2005) does not have the force of law until it is actually adopted by a court or regulatory authority, by being accepted by its sponsoring organizations, the Standards still establish an important standard of care for mediators.[58]

3. *Standard I: Self-Determination*

The Model Standards (2005) defines "self-determination" as the "act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome" and broadens the scope of self-determination by indicating that the parties may exercise it at "any stage" of the mediation.[59] Whereas the Model Standards (1994) failed to address interplay among the standards, the revised version states that a mediator "may need to balance . . . self-determination with [the mediator's] duty to conduct a quality process."[60] Standard I expressly notes, though, that a mediator may *not* under any circumstances undermine party self-determination for reasons such as "higher settlement rates, egos, increased fees, or outside pressures."[61]

Because ensuring that the parties' decisions are fully informed would be an ambiguous and nearly impossible duty to impose upon mediators, the Joint Committee reaffirmed retaining language similar to that of the 1994 version. The mediator is to remain neutral and, rather than engaging in evaluation himself, is urged to, where appropriate, "make the parties aware

---

the mediator is still required to act in a manner consistent with all *other aspects* of Standard I as well as all other Standards. Reporter's Notes, *supra* note 28, at 8–9.

[58] MODEL STANDARDS Note on Construction (2005).

[59] MODEL STANDARDS Standard I(A) (2005). Some of the public expressed concerns that the statement "[s]elf-determination is the fundamental principle of mediation" was not being retained. However, the Joint Committee felt that the language was redundant in light of its expansion of Standard I and the overarching definition of mediation that emphasizes party self-determination. Reporter's Notes, *supra* note 28, at 10.

[60] MODEL STANDARDS Standard I(A)(1) (2005). Sometimes, interplay only requires the mediator to be cognizant of it, but occasionally there will be a conflict. For example, if a disputing party is attempting to label a process as mediation solely to gain the benefits of confidentiality, a mediator may recognize that in that particular instance, quality of process trumps party self-determination. Reporter's Notes, *supra* note 28, at 9.

[61] MODEL STANDARDS Standard I(B) (2005). Where a program administrator is threatening to assign more cases to another mediator with higher settlement rates, for instance, the mediator must remain "steadfast" and resist any urge to force settlement upon the parties. Reporter's Notes, *supra* note 28, at 9–10.

of the importance of consulting other professionals" so that the parties' decisions are informed.[62]

4. *Standard II: Impartiality*

Impartiality under the Model Standards (2005) is "freedom from favoritism, bias or prejudice."[63] Due to growth of mediation in the private sector and the increased diversity of mediation participants, the Joint Committee realized that the impartiality provision had to be substantially changed and therefore prescribed the following conduct.

First, if a mediator cannot conduct the process in an impartial manner, the mediator must decline involvement upfront.[64] Second, throughout the mediation, the mediator "shall conduct a mediation in an impartial manner," as well as avoid behavior that gives the "*appearance* of partiality."[65] The Joint Committee, not satisfied with the 1994 version's mild desire for a mediator to "guard against" impartiality, replaced it with a bolder instruction. A mediator under the Model Standards (2005) "*should not act* with partiality or prejudice based on any participant's personal characteristics, background, values and beliefs, or performance at a mediation."[66] Understanding that cultural traditions often surface in the modern-day mediation context, the Joint Committee decided that mediators *may* accept or give "de minimis gifts or incidental items or services . . . so long as such practices do not raise questions as to a mediator's actual or perceived impartiality."[67] Third, if at any time during the mediation, the mediator becomes unable to act in an impartial manner, the mediator is obligated to withdraw.[68]

---

[62] MODEL STANDARDS Standard I(A)(2) (2005). Considering how differently situated mediators are, it probably would have been improper to hold non-attorney mediators to the same standard as attorney-mediators in terms of informing the parties. If forced to evaluate legal scenarios, non-attorney mediators would run the risk of engaging in the unauthorized practice of law.

[63] MODEL STANDARDS Standard II(A) (2005).

[64] *Id.*

[65] MODEL STANDARDS Standard II(B) (2005) (emphasis added).

[66] MODEL STANDARDS Standard II(B)(1) (2005) (emphasis added). The Standard delineates some elements that tend to threaten mediator impartiality, but are by no means meant to be exhaustive. Reporter's Notes, *supra* note 28, at 11.

[67] MODEL STANDARDS Standard II(B)(3) (2005). The mediator is to respond sensitively to cultural gift-giving, but must engage in a "sincere assessment as to whether accepting such benefits" would impede his impartiality. Reporter's Notes, *supra* note 28, at 11–12.

[68] MODEL STANDARDS Standard II(C) (2005). The Joint Committee specifically declined to require the mediator to withdraw "without harming any parties' interests" for

In its revisions, the Joint Committee eliminated language from the Model Standards (1994) that required appointing agencies to "make reasonable efforts to ensure that mediators serve impartially."[69] The main reason for doing so is that the Model Standards (2005) solely guide *mediator* conduct and do not attempt to regulate more peripheral institutions or individuals.[70]

5. *Standard III: Conflicts of Interest*

As conflicts of interest undermine both mediator impartiality and confidence in the integrity of the process, a mediator must avoid conflicts of interest before, during, and after a mediation.[71] A mediator must first conduct an adequate conflicts check, defined as a "reasonable inquiry to determine whether there are any facts that a reasonable individual would consider likely to create a potential or actual conflict of interest."[72] If prior to the mediation, there is a conflict of interest that "[1] is reasonably known to the mediator and [2] could reasonably be seen as raising a question about the mediator's impartiality," the mediator must disclose the conflict "as soon as practicable" and may only continue with the mediation if all parties consent[73] and the conflict does not undermine the mediation's integrity.[74] Similarly, if *during* a mediation the mediator learns of a potential or actual conflict of interest, the

---

several reasons, including the obvious that withdrawing will most likely always harm at least one of the parties in some shape or form. Reporter's Notes, *supra* note 28, at 11.

[69] MODEL STANDARDS Standard II (1994).

[70] Reporter's Notes, *supra* note 28, at 12.

[71] A conflict of interest can arise from different sources, including the subject matter of the dispute or from a past or present, personal or professional relationship between the mediator and a party. MODEL STANDARDS Standard III(A) (2005).

[72] MODEL STANDARDS Standard III(B) (2005). The Standard acknowledges that an "adequate" conflicts check will vary under different circumstances. For example, a mediator working out of a law firm should probably conduct a firm-wide conflicts check before commencing the mediation; a facilitator at a smaller community agency who is continually handed mediations may fulfill the reasonableness requirement simply by asking the participants about potential conflicts. Reporter's Notes, *supra* note 28, at 13.

[73] MODEL STANDARDS Standard III(C) (2005). During its revision process, the Joint Committee admitted that where a significant portion of a mediator's work comes from a single source, there may be a duty to disclose, but declined to provide specific examples. The Committee believed that "if one attempted to catalogue a comprehensive list, then failure (through oversight) to include some relationship might be seen, incorrectly, to license that conduct." Reporter's Notes, *supra* note 28, at 13.

[74] MODEL STANDARDS Standard III(E) (2005). This is an example of when the Model Standards (2005) deem it appropriate to override party self-determination; integrity of the mediation process may be more important in some instances and there, the mediator must withdraw or decline to proceed.

mediator must disclose it in a timely manner and withdraw unless the parties agree to continue and the mediation's integrity is not questioned.[75]

The mediator's obligation to be cognizant of conflicts of interests continues even *after* the mediation is over, as any future relationships between the mediator and the participants are permissible only if the integrity of the process is not placed in doubt.[76] When weighing the pros and cons, the amount of time elapsed is not conclusive and merely one of several factors to be considered.[77]

6. *Standard IV: Competence*

Recognizing the incredible diversity of the mediator pool, the Model Standards (2005), like the Model Standards (1994), "[does] not create artificial or arbitrary barriers" to the position.[78] A mediator, though, must still have the "necessary competence to satisfy the reasonable expectations of the parties."[79] Often necessary components of mediator competency include training, experience in mediation, skills, and an important element that the Model Standards (1994) had not addressed—cultural understandings.[80]

---

[75] MODEL STANDARDS Standard III(D) (2005).

[76] MODEL STANDARDS Standard III(F) (2005). The Joint Committee expressly declined to place an absolute prohibition on future relationships because if a disputing party particularly likes its mediator's analytical and interpersonal skills, the party should be free to seek his services again. Reporter's Notes, *supra* note 28, at 13–14. *But see* Feerick, *supra* note 14, at 465–67 (discussing the very real dangers of a mediator's subsequent representation in both related and unrelated matters). Permitting the mediator to serve an *adversarial* role with respect to a party from a prior mediation, Feerick argues, should definitely be discouraged since the mediator "undoubtedly possesses private information concerning the attitudes and approaches of a party"; it destroys the mediator's "efficacy as an impartial broker." *Id.* at 466 (citing Lawrence R. Freedman & Michael L. Prigoff, *Confidentiality in Mediation: The Need for Protection*, 2 OHIO ST. J. ON DISP. RESOL. 37, 38 (1986)).

[77] Other factors include, but are not limited to, the nature of the established relationship and the services that were rendered. MODEL STANDARDS Standard III(F) (2005).

[78] Reporter's Notes, *supra* note 28, at 14.

[79] MODEL STANDARDS Standard IV(A) (2005). The Joint Committee replaced the 1994 version's "qualification" with "competence." Reporter's Notes, *supra* note 28, at 14.

[80] MODEL STANDARDS Standard IV(A)(1) (2005). When forming this list, the Joint Committee wished to emphasize that educational degrees do not in themselves constitute competency and that not every factor is necessary to ensure competency. Reporter's Notes, *supra* note 28, at 14.

If after the mediation has begun, the mediator determines that the matters are more complex than anticipated and beyond the mediator's particular competency, the mediator must disclose such concerns to the disputants and take affirmative steps to remedy the situation, such as withdrawing or seeking assistance.[81] The mediator's competence is also erased if the mediator is impaired by drugs, alcohol, or medication; there, the mediator must discontinue service until the impairment is completely corrected.[82]

7. *Standard V: Confidentiality*

Under the Model Standards (2005), the mediator must maintain the confidentiality of all obtained information and may only break the protection of privacy in specific situations. First, if the parties otherwise agree, the mediator may disclose information obtained during the mediation.[83] Standard V(B) specifically states that if a party consents to disclosure during a *caucus*, it remains the mediator's responsibility to make certain that the party's consent was "known, meaningful, and timely."[84] Second, if required by applicable law, the mediator may be required to report certain occurrences, such as whether a party attended a scheduled mediation or whether a resolution was reached.[85] In addition, the mediator must promote understanding among the parties of the extent to which *the parties* will maintain the confidentiality of obtained information.[86] Since parties often have varying expectations regarding confidentiality, it is essential that all participants "actively seek to understand the nature and extent of the confidential status of communications."[87]

To help promote integrity of and public confidence in mediation, the Model Standards (2005), like the 1994 version, permits the testing, research, and evaluation of the process. The Joint Committee rephrased the language,

---

[81] MODEL STANDARDS Standard IV(B) (2005). The Reporter's Notes suggest hiring a co-mediator or finding a replacement. Reporter's Notes, *supra* note 28, at 14.

[82] MODEL STANDARDS Standard IV(C) (2005).

[83] Note that even if the parties agree, the mediator may—but *does not have to*—reveal the information. MODEL STANDARDS Standard V(A), V(A)(1) (2005).

[84] MODEL STANDARDS Standard V(B) (2005). In other words, the mediator during a private session may *not* shift the burden to the party to "flag each element of information that the party wishes the mediator to keep confidential." Reporter's Notes, *supra* note 28, at 16.

[85] MODEL STANDARDS Standard V(A), V(A)(2) (2005).

[86] MODEL STANDARDS Standard V(C) (2005).

[87] Reporter's Notes, *supra* note 28, at 15. After all, it is common for parties to make their own confidentiality rules or for a mediator to dictate a particular set of expectations. MODEL STANDARDS Standard V(D) (2005).

however, so that the obligation falls on the mediator to "protect the anonymity of the parties and abide by their reasonable expectations regarding confidentiality."[88]

8. *Standard VI: Quality of the Process*

A mediator shall advance the quality of the process by generally promoting "diligence, timeliness, safety, presence of the appropriate participants, party participation, procedural fairness, party competency and mutual respect."[89] Specifically, a mediator should agree to mediate only when he is prepared to commit the amount of attention essential to an effective mediation and when he can satisfy the parties' reasonable expectations in regards to timing.[90] Persons may be excluded from the mediation room pursuant to agreement of the parties and the mediator.[91] Standard VI(A)(4) recognizes that modern-day participants occasionally engage in deception or bluffing, but still strongly encourages the mediator to promote honesty and candor and absolutely prohibits the mediator from "knowingly [misrepresenting] any material fact or circumstance in the course of the mediation."[92]

When forming Standards VI(A)(5)–(8), the Joint Committee aimed to more readily distinguish among "related but importantly different directions to the mediator."[93] Standard VI(A)(5) begins by iterating that mixing the role of a mediator with other professional roles can in fact, be problematic and therefore, should only be considered if the mediator is qualified and can do so in a manner consistent with the remainder of the standards.[94] A mediator, then, may take on an additional dispute resolution role if the mediator does

---

[88] MODEL STANDARDS Standard V(A)(3) (2005). The mediator, under such Standard, may discuss aspects of the case as long as he does not "readily enable people to discern the identities of the parties." Reporter's Notes, *supra* note 28, at 16. The evaluator, however, is *not* required to gain consent at every tiny step along the way—the Joint Committee viewed that as unduly burdensome. *Id.*

[89] MODEL STANDARDS Standard VI(A) (2005). Note that Standards VI(A)(1)–(9) are sequenced to "reflect the presumptive order in which a mediator might confront these considerations." Reporter's Notes, *supra* note 28, at 17.

[90] MODEL STANDARDS Standard VI(A)(1), (A)(2) (2005).

[91] MODEL STANDARDS Standard VI(A)(3) (2005).

[92] MODEL STANDARDS Standard VI(A)(4) (2005).

[93] Reporter's Notes, *supra* note 28, at 17.

[94] MODEL STANDARDS Standard VI(A)(5) (2005). It is extremely important that when the mediator is contemplating wearing another professional hat, that party self-determination and mediator impartiality be maintained. Reporter's Notes, *supra* note 28, at 18.

the following: informs the parties of the implications, obtains consent from the parties, and realizes that doing so may very well result in additional duties and responsibilities as mandated by other standards.[95] Along the same lines, a mediator shall not disguise another process as mediation simply to reap its benefits, but a mediator *may* recommend that the parties seek another resolution process, such as arbitration or counseling.[96]

Whereas the Model Standards (1994) compelled certain reactions from a mediator facilitating a discussion being used to further "illegal conduct," the Model Standards (2005) takes a more specific stance and only urges the mediator to take appropriate steps if a mediation is being used to further "criminal conduct."[97] New language was also added to guide the mediator who is conducting a process in which the participants have recognized disabilities. After debate on how to address this situation, the Joint Committee settled on suggesting that the mediator "explore the circumstances and potential accommodations, modifications or adjustments that would make possible the party's capacity to comprehend, participate and exercise self-determination."[98]

The Model Standards (1994) had been silent on the topic, but due to an increase of mediations in which allegations of domestic abuse arise, the Joint Committee included language insisting that the mediator who is made aware of such domestic abuse or violence among the parties take appropriate steps.[99] Finally, the Model Standards (2005) has a catchall provision to help

---

[95] MODEL STANDARDS Standard VI(A)(8) (2005). For example, if the mediator is qualified to also act as an arbitrator, can do so within the Model Standards' bounds, informs the parties of his intent, and receives consent from the parties, the now-arbitrator must also act within the realm of the Code of Ethics for Arbitrators. Reporter's Notes, *supra* note 28, at 18.

[96] MODEL STANDARDS Standard VI(A)(6)–(7) (2005). To recommend another process, the following hurdles must be surpassed: (1) mediation efforts have been unsuccessful and the process is an appropriate fit for the dispute and (2) the mediator as a result of training or experience is able to explain how the alternative process operates. Reporter's Notes, *supra* note 28, at 18.

[97] *Compare* MODEL STANDARDS Standard VI (1994) *with* MODEL STANDARDS Standard VI(A)(9) (2005). "Appropriate steps" under the revised Standards include postponing, withdrawing from, or terminating the mediation. Reporter's Notes, *supra* note 28, at 18. The Joint Committee rejected public suggestion that the mediator be forced to affirmatively report criminal conduct to the legal authorities because of the situation's subtlety and because certain confidentiality laws or agreements may prevent it and even expose the mediator to liability. *Id.*

[98] MODEL STANDARDS Standard VI(A)(10) (2005).

[99] MODEL STANDARDS Standard VI(B) (2005). "Domestic abuse" is defined broadly to encompass both physical violence and psychological coercion. Also note that violence

guarantee quality of process, namely that if any participant's conduct (the disputants' or the mediator's) is jeopardizing the quality as upheld by the Standards, the mediator shall take appropriate steps to remedy the situation.[100]

9. *Standard VII: Advertising and Solicitation*

Again, the growth of mediation—especially in the private sector—required that slight amendments be made to the Model Standards' (1994) section on advertising and solicitation. In addition to being truthful, the mediator must also now not mislead when advertising, soliciting, or communicating the mediator's qualifications, experience, services, and fees.[101] Rather than just "[refraining] from promises and guarantees of results," the Model Standards (2005) more specifically discourages mediators from promising outcomes in several forms of communications, such as business cards, stationery, or computer-based communications.[102] The Model Standards (2005) does not command a certain level of training for mediators, but if a governmental entity or private organization has a recognized procedure for qualifying mediators and has granted that status on a particular individual, the mediator is permitted to advertise the mediator's qualifications as such.[103]

Two further additions were made. First, the mediator must not solicit in a manner that either gives an appearance of partiality or undermines the integrity of the process in any other way.[104] Second, unless the mediator has received permission to do so, the mediator must not use the names of past participants in any form of communication.[105]

---

in *non-domestic* relationships must be attended to by the mediator. Reporter's Notes, *supra* note 28, at 19.

[100] MODEL STANDARDS Standard VI(C) (2005).

[101] MODEL STANDARDS Standard VII(A) (2005).

[102] MODEL STANDARDS Standard VII(A)(1) (2005).

[103] MODEL STANDARDS Standard VII(A)(2) (2005). A different situation that would be impermissible under the Model Standards (Apr. 2005) would be if an individual completed a privately-offered mediator training program, received a "Certificate," and advertised that the mediator is a "Certified" mediator—inferring (and misleading the public) that the mediator has "met a more stringent level of selectivity." A "Certified" status may be advertised under the Standards, then, only under certain situations, such as when someone has been "Certified," for example, to be on a roster. Reporter's Notes, *supra* note 28, at 19–20.

[104] MODEL STANDARDS Standard VII(B) (2005).

[105] MODEL STANDARDS Standard VII(C) (2005).

10. *Standard VIII: Fees and Other Charges*

Several changes were made to this section, beginning with the title itself: the Model Standards (2005) adds the words, "and other Charges." The Model Standards (2005) requires the mediator to provide each party or its representative with "true and complete information" about "fees, expenses and any other actual or potential charges that may be incurred."[106] In regards to maintaining mediator impartiality, the mediator should not enter into fee arrangements that are contingent upon a certain result, but the controversial practice of accepting unequal amounts from the respective parties[107] under the Model Standards (2005) *is* permissible, so long as the mediator discloses the arrangement to avoid the presumption of impartiality and remains attentive so that impartiality remains constant and the integrity of the process is not undermined. [108]

11. *Standard IX: Advancement of the Mediation Process*

To encourage positive behavior rather than simply imposing a burden on mediators, this section is no longer entitled "Obligations to the Process." Mediators do not have to engage in all of the following activities all of the time, but should advance the practice by: fostering diversity; striving to make mediation accessible; participating in research, outreach, and education efforts; and assisting newer mediators.[109] Within the field of mediation, the mediator should also demonstrate respect for others' perspectives and seek to learn from and work with other mediators.[110]

---

[106] MODEL STANDARDS Standard VIII(A) (2005). In shaping those fees, the Model Standards (2005) retained the 1994 version's ideas of considering type and complexity of the matter, the mediator's qualifications, the required time, and customary rates. Also like the Model Standards (1994), the Model Standards (2005) urges the mediator to put the fee arrangement in writing. *Id.* at (A)(1)–(2).

[107] The Joint Committee was acutely aware that process integrity may be undermined if (1) a party later discovers the arrangement and fears that the outcome was skewed in favor of the higher payer or (2) the higher payer is the mediator's primary or exclusive client. However, because in reality many parties are comfortable with unequal fee arrangements (especially those who otherwise would not have access to mediation's benefits), the Joint Committee wished to permit the practice, with certain procedural safeguards. Reporter's Notes, *supra* note 28, at 20–21.

[108] *Id.*; *see also* MODEL STANDARDS Standard VIII(B) (2005).

[109] MODEL STANDARDS Standard IX(A) (2005). The list is not intended to be exhaustive.

[110] MODEL STANDARDS Standard IX(B) (2005).

IV. IMPLICATIONS OF THE MODEL STANDARDS (2005)

Eleven years after forming the original guideposts, representatives from the same organizations have produced a set of standards for mediators with a similar skeleton, but fresher and more up-to-date substance. Were the Joint Committee's goals realized? And if not, what questions remain?

A. *Positive Changes*

First, the Model Standards (2005) is much more user-friendly than the Model Standards (1994). Simple decisions go a long way, and the Standards' short titles and clear-cut organization provide mediators with a document that is far easier to navigate. Similarly, by differentiating between what a mediator "shall" and "should" do, the mediator is in a better position to determine the level of obligation owed by the mediator.

Second, the revised Standards properly acknowledges and strongly encourages appreciation for the increasing diversity found within the field of mediation. For example, the Joint Committee added "cultural understandings" as an often necessary element of mediator competency. Also, assuming that it does not negatively impact mediator impartiality, the Model Standards (2005) permits mediators to accept de minimis gifts or incidental items in order for cultural traditions to be respected. Finally, a much-needed step was taken when the Joint Committee reframed the language regarding participants with disabilities in Standard VI(A)(10).

Third, the Model Standards (2005) is realistic. In that light, the Joint Committee made sure that the Standards solely guides *mediator* conduct, rather than attempting to regulate the disputants' behavior. Doing so reaffirms party self-determination, and if the mediators abide by the ethical guidelines, should also increase integrity in and quality of the process. By broaching and laying down standards on previously neglected but extremely important topics such as domestic abuse, violence between the parties, and unequal payment schemes, the Joint Committee helped bring to fruition its goal of "[responding] to new developments in mediation practice."[111]

---

[111] Reporter's Notes, *supra* note 28, at 2.

B. *Lingering Concerns*

An often-repeated criticism of the Model Standards (1994) was that it "[failed] to give guidance on issues bedeviling the field."[112] Even with its many improvements, some quandaries remain unaddressed by the Model Standards (2005). For instance, most real world mediators when faced with an obvious power imbalance between the parties want to take some sort of action "to ensure that the power imbalance does not threaten the ability of the weaker party to assert his own opinions . . . and to participate fully in the mediation."[113] However, under the still quite generally-phrased Standard II, that mediator would run the high risk of creating an appearance of partiality. Without more specific guidance on how to react to certain situations, the standards often become a matter of interpretation—especially since the Model Standards (2005) imposes no punishment for "disobedience." The Standards may unintentionally encourage varying behaviors.

The Model Standards (2005) also leaves questionable wiggle room with regard to the facilitative versus evaluative mediation debate. While the Standards' definition of mediation is primarily facilitative in nature[114] and party self-determination is continually stressed, the Model Standards (2005)—as with the 1994 version—still permits mediators to take on additional dispute resolution roles in certain limited circumstances.[115] This permissible activity is especially problematic for two reasons. First, Standard VI provides little guidance as to *when* it is appropriate for mediators to assume this secondary role,[116] granting wide discretion to the mediator which in and of itself could be seen as evaluative. Second, besides mentioning that the mediator who takes on additional roles may now be subject to other codes of conduct, the Standards does not adequately highlight the potentially devastating effect on mediator impartiality.[117]

---

[112] Schuwerk, *supra* note 10, at 760; *see also* Henikoff & Moffitt, *supra* note 30, at 87 (stating that the Model Standards (1994) provide only "broad guidance with . . . no recognition of difficult ethical dilemmas").

[113] *Id.* at 88–89.

[114] MODEL STANDARDS Preamble (2005).

[115] MODEL STANDARDS Standard VI(A)(5), (A)(8) (2005).

[116] Henikoff & Moffitt, *supra* note 30, at 90–91.

[117] *Id.*; *see also id.* at n.16 (explaining that even if the mediator's actions are impeccable through the lens of lawyers' standards of professional conduct, "the disadvantaged party is likely to perceive the mediator's actions as inappropriately partial").

V. CONCLUSION

One could continue highlighting the supposed shortcomings of the Model Standards (2005), but doing so is futile. The questions that remain unanswered by the revised Standards are most likely questions that have baffled mediators for years and will continue to baffle and spark academic debate for years to come. There will always be differences of opinion on what constitutes "best practice," which is why the route taken by the Model Standards of Conduct for Mediators—simply providing a general framework for the neutrals and updating it accordingly—is perhaps the most sensible route of all.

Laura E. Weidner