

Nebraska
Office of Dispute Resolution

Manual of
Standards and Ethics
for
ODR-Approved Mediation Center
Mediators, Directors and Staff

Revised June, 2001

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Center Mediators, Directors and Staff**

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Preamble

Mediation is a process in which a trained mediator assists the disputing parties to communicate and to make voluntary, informed choices in an effort to find a mutually acceptable resolution to their dispute. The mediator strives to be impartial, neutral, and unbiased. Mediation ethics derive from the mediator's respect for each party's uniqueness, personal and cultural values, dignity, competence, and right to self-determination.

With the passage of the Dispute Resolution Act in 1991, the Unicameral promoted the development of mediation in Nebraska. The Act (Neb. Rev. Stat. §25-2901 et seq. (Cum. Supp. 1992)) created a statewide system to approved, community-based mediation centers and an Office of Dispute Resolution in the judicial branch of state government. Mediators and staff affiliated with approved centers under the Act are governed by this Manual of Standards and Ethics for Center Mediators, Directors, and Staff.

A state Advisory Council on Dispute Resolution advises the Office of Dispute Resolution. The Council assisted the Nebraska State Bar Association's Alternative Dispute Resolution Committee in the development of this Manual.

This Manual recognizes and reflects national standard and ethical development, particularly that of Standards for Court-Connected Mediation Programs developed by the Center for Dispute Settlement and National Institute of Judicial Administration, the Ethical Standards of Professional Responsibility of the Society for Professionals in Dispute Resolution, The Standards of Practice for Family Mediators by the American Bar Association, and the Ethics and Standards Manual for NJC Volunteer Mediators by the Los Angeles Neighborhood Justice Center.

I. Standards and Qualifications for Mediators

A. General Qualifications of Mediators

In order to be accepted as a mediator for a mediation center which is approved by the Office of Dispute Resolution (hereinafter, the Office), a candidate shall successfully complete a basic mediation training program administered or approved by the Office, be approved by the director of the mediation center as a proficient mediator, agree in writing to abide by the terms of this Manual of Standards and Ethics for Center Mediators, Directors, and Staff, and fulfill apprenticeship requirements. There are no age, race, sex, or educational standards or requirements for mediators.

B. Basic Training Program

1. The basic mediation training shall be arranged by the Office for selected candidates. Candidates are chosen by center directors to attend training based upon an application and/or interview process.
2. The basic mediation training program shall consist of 30 hours of training which shall include two or more simulated mediation sessions in which the candidates receive critiques from the trainers and coaches.
3. Training shall include the theory and process of mediation, communication skills, neutrality, agreement writing, and ethics. Training shall also include recognizing and dealing with issues of bias.
4. Candidates shall apprentice with an experienced mediator for at least three mediation sessions. Center directors and experienced mediators shall provide verbal and written evaluation to candidates regarding their skills necessary for competency as a mediator, listed in I.C. The center director has final responsibility for supervision of the mediators.
5. Participants will be asked to evaluate each mediation session. Center directors shall provide appropriate feedback to mediators from these evaluations.
6. Evaluation of the competency of a candidate shall not depend on whether or not the parties reached an agreement.
7. Candidates trained in a program other than that provided by the Office of Dispute Resolution may submit their training qualifications to the Office for approval. If the Office finds the candidate qualified, the candidate's approved application will be forwarded to the local center. Center directors determine the candidate's competency to mediate.

C. Skills Necessary for Competency as a Mediator:

1. Ability to listen actively.
2. Ability to identify and separate issues, and to frame these issues for resolution or decision making.
3. Ability to use clear, neutral language in speaking and writing.
4. Sensitivity to strongly felt values of the parties, including gender, ethnic, and cultural differences.
5. Ability to deal with complex factual materials.
6. Presence and persistence, i.e. an overt commitment to honesty, dignified behavior, respect for the parties, and an ability to create and maintain control of a diverse group.
7. Ability to identify and to separate the mediator's personal values from issues under consideration.
8. Understanding of power imbalances.
9. Understanding of the negotiating process.
10. Ability to earn trust.
11. Ability to assist parties in converting their positions into needs and interests.
12. Ability to screen out non-mediabile issues.
13. Ability to help parties invent creative options.
14. Ability to help parties identify principles and criteria that will guide their decision making.
15. Ability to help parties assess their non-settlement alternatives.
16. Ability to help parties make their own informed choices.
17. Ability to help parties assess whether their agreement can be implemented.
18. Knowledge of the range of available dispute resolution processes, so that, where appropriate, cases can be referred to a more suitable process.
19. Ability to help parties assess the need for more information and to refer to additional resources when appropriate, including legal assistance.
20. Adherence to ethical standards.

D. Service Requirement

Mediators shall volunteer a minimum of 24 hours of service to the center. Upon the completion of service, a mediator may be selected by the center director to continue as a paid or volunteer mediator.

E. Additional Training for Family Mediators

In order for a mediator to mediate disputes involving marital dissolution, the mediator shall have successfully completed an additional 30 hours of family mediation training, which includes simulation of family disputes, training about family dynamics and domestic violence, and general background in Nebraska family law.

F. In-Service Training

1. Mediators shall attend a minimum of two in-service training programs or workshops per year. Such trainings may address mediation skills, cultural sensitivity, family violence, updates of family law and specialized areas of mediation. The Office and centers may offer such programs or designate an acceptable offering.
2. It is the responsibility of the center directors and mediators to keep abreast of current techniques, issues, and concerns in the field of mediation.

G. Mediators in the Professions

1. A mediator who is also a member of a profession that has adopted ethical rules about mediation shall follow such rules.
2. The mediator who is also an attorney must clearly inform the parties of the nature and limits of the lawyer's role as a mediator.
 - a. The role of a mediator does not create a lawyer-client relationship with any of the parties and does not constitute representation of any of them.
 - b. While acting as a mediator, as well as after the mediation has concluded or otherwise terminated, the lawyer must not represent any of the parties in the matter under mediation or in any related matter.

II. Administrative Guidelines for Center Directors

A. Balance in Selecting Mediators

Center directors shall attempt to achieve a diversity in the selection of mediators, including consideration of race, ethnicity, gender, age, language abilities, occupational background, and experiences.

B. Selection, Assignment, Supervision and Termination of Mediators

Center directors shall be responsible for the selection, assignment, supervision, and termination of mediators. Intake and scheduling staff may assist in the assignment of mediators.

C. Guidelines for Assignment of Mediators to Specific Cases

1. The primary guideline in assignment of a mediator to a specific case is that the mediator be appropriate to both the dispute and the parties.

2. A mediator may be assigned to any case unless:
 - a. The mediator lacks the necessary expertise in the subject matter of the dispute.
 - b. The mediator is unable to be impartial toward the subject matter of the dispute or the parties.
 - c. There exists a conflict of interest between the mediator and the dispute or the parties (refer to sections below).
 - d. The mediator is uncomfortable mediating the dispute or otherwise believes it would be inappropriate to do so.
3. Center directors, or their designated staff, shall consider the use of co-mediation in all appropriate cases. It is preferred practice to assign co-mediation in family and multi-party disputes and to assign both a male and female mediator in divorce mediation.

III. Ethics

A. Impartiality, Neutrality, and Fairness

1. A mediator should strive to maintain impartiality towards all parties and be free of favoritism or bias in appearance, word, and action. A mediator is committed to aiding all parties, as opposed to a single party, in exploring the possibilities for resolution.
2. If a mediator, at any point, believes he or she cannot be impartial and fair, he or she should withdraw from the mediation, regardless of the desires of the parties.
3. If a party states a belief that a mediator is biased or shows favoritism, the mediation should proceed only if all parties state agreement to do so.
4. A mediator should strive to remain neutral as to the contents of an agreement between the parties while raising questions about the fairness or feasibility of options under consideration as well as their impact on affected third parties.
5. A mediator has a duty to remain neutral as to whether the parties use mediation or some other process to resolve the dispute. Under no circumstances may a mediator coerce a party into continuing mediation or reaching agreement.
6. Under no circumstances may a mediator make a substantive decision for a party or advise for or against any proposal under consideration.

7. If a court has referred a case to mediation, it is preferable that communication with the court be conducted by the center director. Only the following information may be given to the courts:
 - a. A request for additional time to continue mediation.
 - b. If all parties agree, a request for procedural action by the court that will facilitate the mediation process.
 - c. An assessment that the case is inappropriate for mediation without elaboration.
 - d. A report that the parties reached agreement prior to mediation.
 - e. A report that mediation resulted in an agreement and a copy of the agreement if requested by the court.
 - f. The failure of a party to make an initial contact with the Center.
 - g. The failure to reach agreement without comment or recommendation.
 - h. Information that, in the judgment of the center director, reveals a danger of physical harm to court personnel.
 - i. *For cases under the Parenting Act (effective 9/94), a report that the mediator has heard an accusation of child abuse or neglect as defined by statute which the mediator has reasonable cause to believe is true.*

B. Conflict of Interest

1. A mediator has a duty to disclose to the parties any known significant past or current professional or personal relationships with a party or an attorney involved in the mediation. A mediator must disclose any relevant financial interests. All such disclosures must be made as soon as practical after the mediator becomes aware of the relevance of the relationship, financial interest, or issue to the mediation. The duty of disclosure is a continuing obligation throughout the process.
2. A mediator must never accept or give a gift, request, favor, loan or any other item of value to or from a party, attorney or any other person involved in any pending or scheduled mediation.
3.
 - a. If a mediator previously provided legal or counseling services to one party, the mediator shall withdraw. If the previous relationship was of a different nature, the mediator will offer the parties the opportunity to chose whether or not to proceed.

b. *For cases under the Parenting Act (effective 9/94), the mediator must withdraw if there was any previous relationship in which a party was a client of the mediator or was represented by the mediator.*¹

4. A mediator shall not use the mediation process to solicit, encourage or otherwise incur future services with either party.

C. Confidentiality

1. To encourage a frank and full exploration of issues between parties, the mediator has a duty to maintain confidentiality for all verbal or written information relating to the subject matter of a dispute between the parties in mediation to the extent permitted by the law. The mediator must also explain confidentiality and its limits to the parties in the introduction to the mediation.

The following two situations are exceptions to the general rule that whatever is said in mediation will be held in confidence by the mediator and center staff:

a. The mediator must report to police or the Nebraska Department of Health and Human Services if he or she has reasonable cause to believe a child was abused or neglected.² *For cases under the Parenting Act (effective 9/94), the mediator shall report to the center director, who shall report to the district judge hearing the case.* If the mediator is uncertain whether there is a duty to report under the law, he or she should discuss it with the director of the affiliated center.

b. If the mediator receives information that he or she believes reveals a danger of physical harm either to a party or a third person, there may be a duty to report the information to the police or warn the third person. Before taking such action, a mediator should discuss this matter with the center director.

¹As to what action a mediator must take when both parties were clients, see Nebraska statute 43-2905(3). Also, see III. D. 1. a. iii.

²Nebraska statute 28-710 provides this definition: "Abuse or neglect shall mean knowingly, or negligently causing or permitting a minor child to be: (a) Placed in a situation that endangers his or her life or physical or mental health; (b) cruelly confined or cruelly punished; (c) deprived of necessary food, clothing, shelter, or care; (d) left unattended in a motor vehicle if such minor child is six years of age or younger; (e) sexually abused; or (f) sexually exploited by allowing, encouraging, or forcing such person to solicit for or engage in prostitution, debauchery, public indecency, or obscene or pornographic photography, films, or depictions."

2. Center directors, mediators, and staff shall maintain confidentiality in the storage and disposal of records and shall render anonymous all identifying information when materials are used for research, training, or statistical compilations.

D. Issues Related to the Mediation Process

1. Before Mediation

- a. In the introductory phase of the mediation, the mediator should:

- i. State that decision-making authority rests with the parties.
- ii. State that the mediation process may be terminated by the mediator and that a party may terminate mediation at any time for any reason by request.
- iii. Disclose all information that may raise a question as to the mediator's impartiality, neutrality, or fairness. As a general practice, the mediator shall inform the center director of such a question prior to accepting a case. It is preferred practice for the mediator to withdraw if there is doubt as to impartiality, neutrality, or fairness.
- iv. Explain that the mediator and center staff are ethically obligated to make every reasonable effort to maintain confidentiality for whatever is said in mediation unless the parties agree it may be disclosed. The mediator should also explain the exceptions to confidentiality.
- v. *For cases mediated under the Parenting Act (effective date 9/94), explain that evidence of child abuse or neglect shall be reported to the district judge who shall hold an in-camera hearing to determine if a report should be made to police or the Department of Health and Services.*

- b. The center staff shall inform the parties about fee arrangements prior to the mediation.

2. During Mediation

- a. A mediator shall seek to establish a tone of reasonableness, respect, and honesty during mediation.

- b. If at any point the mediator comes to believe a case is inappropriate for mediation, then he or she shall terminate the mediation. Among the factors that may make a case inappropriate are physical or psychological victimization or significant inequality of knowledge or sophistication that impairs the ability of a party to protect his or her own interests or honor his or her own agreements. It may also be inappropriate to continue mediation when there is significant resistance to reach any agreement on the part of one or both parties. A mediator shall not prolong unproductive discussions that would result in emotional or monetary costs to the participants.
- c. A mediator should be aware of and recommend outside resources to the parties whenever appropriate.

3. Before the Parties Sign an Agreement

A mediator has a duty to inform parties before they sign an agreement that they should consult an attorney before signing if they are uncertain of their legal rights.

E. Other Legal Issues

- 1. No legal advice should be given by the mediator and the mediator should inform the parties that they should not look to the mediator for legal advice.
- 2. When appropriate, the mediator should suggest to the parties that they may obtain their own legal advice and counsel. However, mediators should not refer or recommend matters to themselves or to specific individual attorneys or law firms.
- 3. A mediator shall not knowingly allow the parties to sign an illegal agreement. If a mediator knows an agreement reached by the parties is illegal, he or she must terminate the mediation before the agreement is signed.
- 4. Lawyers for the parties to a mediation shall not be excluded if the parties want them present.

F. Fees and Advertising

- 1. The mediator shall follow the policies about fees of the center to which he or she is affiliated.

2. Fees may never be based on the outcome of a dispute.
3. A mediator shall not pay commissions or give any other form of reward for referrals of a client for mediation.
4. A mediator shall not make exaggerated claims about the mediation process, its costs and benefits, its outcome or the mediator's qualifications and abilities.

G. Continuing Education and Research

1. A mediator should strive to improve his or her mediation skills using peer review, training, or other methods.
2. When a mediator is uncertain about ethical choices in mediation, it is preferred practice to consult with other mediators while taking care to keep the identity of parties confidential.
3. A mediator should cooperate to the extent it is practical with research efforts to assess mediation.