

2019 NM ADR SYMPOSIUM

Ethics for Court-Connected Mediation Programs: Navigating Tricky Waters

A court-connected mediation program imposes ethical requirements upon judicial officers, court staff, program managers, and attorneys. Unexpected sometimes. Navigating ethics can be straightforward if you know the way. This presentation will explore what ethical considerations may be involved and will address how to provide an ethical and beneficial mediation service. The takeaways will include theory and practical tips.

Topics

1. Introduction
2. What is Mediation?
3. Program standards
4. Information & Forms
5. Legal Advice
6. Confidentiality
7. Family Mediation
8. Domestic Violence
9. Tips, Traps, Tools, and Take Aways

Materials

Printed:

1. Workshop Handout

Available on www.nmadr.org:

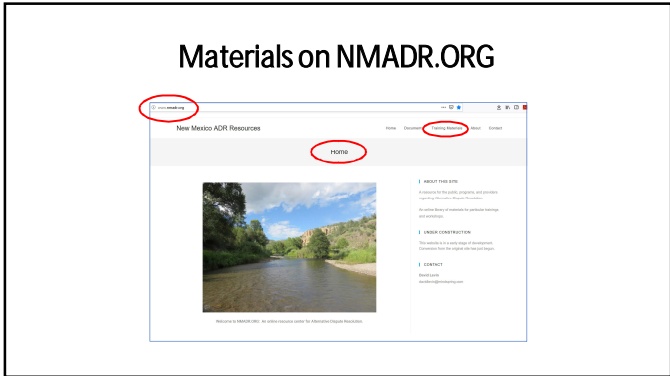
2. New Mexico Statewide Guidelines for Court-Connected Mediation Services
3. National Standards for Court Connected Mediation Programs
4. Model Standards of Practice for Family and Divorce
5. New Mexico Mediation Procedures Act
6. New Mexico Supreme Court General Rules. 23-113. Providing court information to self-represented litigants
7. Second Judicial District Court -Court Staff Can-Can'ts
8. 40-4-8 NMSA. Contested custody; appointment of guardian ad litem
9. 4A-100 NMRA. Domestic relations forms; instructions and cautions regarding use of forms.
10. Florida Rules for Certified and Court Appointed Mediators
11. Michigan Judicial Institute, Employee Guide to Legal Advice
12. ABA Ethical Opinion SODR 2010-1 Mediator Drafting Agreement
13. ABA Ethical Opinion SODR 2010-2 Child Support Worksheet Preparation
14. ABA Ethical Opinion SODR 2016 Role of Mediator
15. Power of Mediator Expertise - What is a Mediator to Do?

Presenter

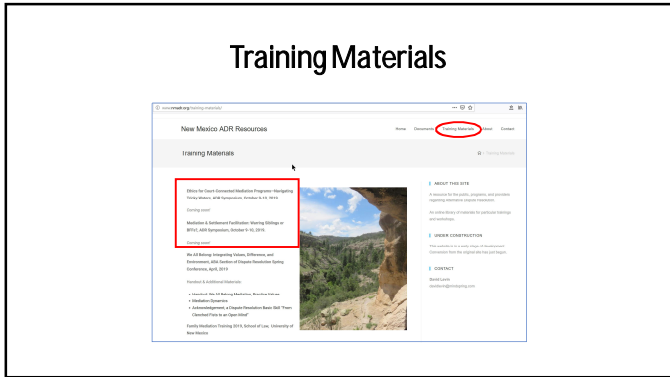
David Levin graduated from the UNM School of Law in 1977 and has been a trained mediator since 1987. David began his legal career as a civil litigator and general practitioner, later becoming a Board Recognized Specialist in Family Law and establishing a general private mediation practice. David has served as a court administrator of local and statewide alternative methods of dispute resolution programs, and has taught basic, family, magistrate court, and advanced mediation, as well as settlement facilitation.

Ethics for Court-Connected Mediation Programs: Navigating Tricky Waters

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Part I – Introduction

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ADR Court-Connected Programs

There are many methods of alternative dispute resolution. Each method is distinct with its own format, purpose, core values, and techniques. Each offers a different service.

People coming to a courthouse have a wide range of individual needs. Each person, as well as each case, has a unique profile of needs. The service(s) which will fit a particular person or case will vary.

All needs cannot always be squeezed into one method of alternative dispute resolution. The task is to match needs with method(s).

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Court-Connected Mediation Programs

What is the method of alternative dispute resolution known as mediation? What is the nature of the service? What are the format, purpose, core values, and techniques of mediation?

In the continuum of ADR services, what are ethical boundaries which distinguish mediation from other methods?

How do courts have programs which fit both the nature of the service and the needs of the people coming to the courthouse?

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Definition of ethic

- ethic noun ...
2. a. a set of moral principles : a theory or system of moral values
 - b. ...the principles of conduct governing an individual or a group...
professional ethics
 - c. a guiding philosophy
 - d. a consciousness of moral importance...

<https://www.merriam-webster.com/dictionary/ethic>

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Natural Instincts

- Desire to help
- Desire to close cases
- Desire to be "successful"
- Desire to just do what needs to be done

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Boundaries

- What are the ethical boundaries which help define the service?
- What are the core values which shape those boundaries?
- What standards should govern the conduct of the program?

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References

- New Mexico rules, statutes, and guidelines
- National standards
- State and federal programs
- Data, research, and literature
- Professional organizations
- And more...

This presentation is only an introduction.
Each individual program requires its own research.

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Outline

- Part I – Introduction
- Part II – Mediation Defined
- Part III – Program Standards
- Part IV – Information & Forms
- Part V – Legal Advice
- Part VI – Confidentiality
- Part VII – Family Law
- Part VIII – Domestic Violence
- Part IX - Tips, Traps, Tools, and Take Aways

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Part II – Mediation Defined

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Mediation

A confidential opportunity for the parties to use self-determination to work with the assistance of a mediator towards the resolution of a dispute.

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New Mexico Statewide Guidelines for Court-Connected Mediation Services

GUIDELINE II. Definitions...

B. **"Mediation" means a process in which a mediator:**

1. facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute; or
2. promotes reconciliation, settlement, or understanding between and among parties.

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Guideline II

Comment
General...

- The term **"mediation" is broad.**
- Throughout the nation the term encompasses many methods, sometimes known as **styles, for the practice of mediation.** The range of methodology includes facilitative, evaluative, transformative, and other approaches, as well as combinations of approaches.
- The **format for mediation** also has a wide range of possibilities, including joint session based mediation, shuttle diplomacy, time limited dispute resolution sessions, and many more. [bullet point format added for clarity]

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Guideline II

Comment
General...

The definition of "mediation" in these Guidelines encompasses both mediation and settlement facilitation, the terms commonly used in New Mexico to describe mediation services. Although some view mediation and settlement facilitation as different processes and formats, the national consensus is that they both fall within the single term of "mediation."

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National Standards for Court-Connected Mediation Programs

DEFINITIONS - Mediation

Mediation is a term that has been used to describe a range of practices designed to help parties in conflict. In these Standards, the term is used to describe a process in which an impartial person helps those parties to communicate and to make voluntary, informed choices in an effort to resolve their dispute.

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Part III – Program Standards

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NATIONAL STANDARDS FOR COURT-CONNECTED MEDIATION PROGRAMS

1. Access to Mediation
2. Courts' Responsibility for Mediation
3. Information for Judges, Court Personnel, and Users
4. Selection of Cases and Timing of Referral
6. Qualifications of Mediators
7. Selection of Mediators
8. Ethical Standards for Mediators

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NATIONAL STANDARDS

9. Confidentiality
10. The Role of Lawyers in Mediation
11. Inappropriate Pressure to Settle
12. Communications Between Mediators and the Court
13. Funding of Programs and Compensation of Mediators
14. Liability of Mediators
15. The Enforceability of Mediated Agreements
16. Evaluation

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Standard 2

2. Courts' Responsibility for Mediation
- 2.1 The degree of the court's responsibility for mediators or mediation programs depends on whether a mediator or program is employed or operated by the court, receives referrals from the court, or is chosen by the parties themselves:
 - a) **The court is fully responsible for mediators it employs and programs it operates;**
 - b) The court has the same responsibility for monitoring the quality of mediators and/or mediation programs outside the court to which it refers cases as it has for its own programs;
 - c) The court has no responsibility for the quality or operation of outside programs chosen by the parties without guidance from the court.

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Standard 2

2. Courts' Responsibility for Mediation
- 2.2 The court should **specify its goals in establishing a mediation program or in referring cases to mediation programs or services outside the court and provide a means of evaluating** whether or not these goals are being met...

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Standard 6

6. Qualifications of Mediators
- 6.1 **Courts have a continuing responsibility to ensure the quality of the mediators to whom they refer cases.** Qualifications of mediators to whom courts refer cases should be based on their skills. Different categories of cases may require different types and levels of skills. Skills can be acquired through training and/or experience. No particular academic degree should be considered a prerequisite for service as a mediator in cases referred by the court.
- 6.2 Courts need not certify training programs but should ensure that the training received by the mediators to whom they refer cases includes role-playing with feedback.
- 6.3 Courts are **responsible for determining that the mediators to whom they refer cases are qualified.** The level of screening needed to determine qualifications will vary depending upon the type of case involved.

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Standard 6

6. Qualifications of Mediators
- 6.4 Courts should **orient qualified mediators to court procedures.**
- 6.5 Courts should **continue to monitor the performance of mediators** to whom they refer cases and ensure that their performance is of consistently high quality.
- 6.6 Courts should adopt procedures for **removing from their roster** of mediators those mediators who do not meet their performance expectations **and/or ensuring that they do not receive further court referrals.**

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New Mexico Statewide Guidelines for Court-Connected Mediation Services

GUIDELINE IV. Policies and procedures.

A. Minimum standards. Each court and the Administrative Office of the Courts, if offering court-connected mediation services, should adopt **written policies and procedures for the services and the qualifications of mediators**. The policies and procedures should at a minimum address the following:

- (1) eligibility requirements for cases referable to mediation;
- (2) referral procedures;
- (3) mediator qualifications and assignment, including how mediators are selected and how an assigned mediator may be replaced;

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GUIDELINE IV

- (4) payment of fees (if any) by the mediation parties, including provisions to make mediation available regardless of the mediation parties' ability to pay;
- (5) collection of administrative data;
- (6) management of grievances about the services or mediators;
- (7) pre-mediation review of cases for capacity issues including domestic abuse;
- (8) management of capacity issues—including issues arising from domestic abuse—which are identified at any time during the court-connected mediation services; and
- (9) opt-out procedures for legal parties and mediation parties who choose not to participate in mediation.

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GUIDELINE IV

B. Qualifications of mediators. **Written policies and procedures** should be developed in the following areas to aid in ensuring that the mediators are qualified.

- (1) **Minimum qualifications.** A mediator's qualifications should be based on the skills needed for the type of case. Different categories of cases may require different types and levels of skills. Skills can be acquired through training and experience.
- (2) **Evaluation.** To ensure that mediators' performance is of consistently high quality, procedures should be established to evaluate the mediators' performance.
- (3) **Professional development.** A mediator should be required to participate in educational programs and related activities to maintain and enhance the mediator's knowledge and skills related to mediation.

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GUIDELINE V

GUIDELINE V. Ethical standards for mediators.

Each court and the Administrative Office of the Courts if offering court-connected mediation services should adopt a set of ethical standards for mediators. The standards should at a minimum address the issues set forth in this Guideline. The standards should apply only to mediators who mediate in court-connected mediation services. Failure to comply with an obligation or prohibition imposed by a standard may be a basis for removal of a mediator from a court roster. These standards should not give rise to a cause of action for enforcement of these Guidelines or for damages caused by alleged or perceived failure to comply with an obligation or prohibition imposed by a standard set forth in these Guidelines.

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Part IV – Information & Forms

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How People Arrive in the Court House

Lacking information and understanding of:

- Rights and obligations
- Applicable law
- Applicable legal procedures
- Available legal remedies
- Realistic expectations
- What to do and when
- How to conduct themselves

- What forms they need and how to use them
- What is mediation and how to participate
- How to make and to legalize an agreement
- Everything else and more...

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Economic Reality

Participants may not have:

- Access to information
- Money to acquire information
- Capacity to understand information
- Ability to use information
- An attorney

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Lack of Information

- Creates fear, false assumptions, and unrealistic expectations
- Decreases ability to navigate the legal system
- Decreases realistic options for resolution
- Increases chaos, confusion, and conflict
- Increases dissatisfaction and problematic outcomes

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Information & Forms

- What may I tell someone?
- What may I give someone?
- How may I help someone with a form?

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New Mexico Supreme Court General Rules. 23-113. Providing court information to self-represented litigants

23-113. Providing court information to self-represented litigants.

A. Self-represented litigant, court staff, defined. For purposes of this rule, a self-represented litigant is any person who appears, or is contemplating an appearance, in any court in this state without attorney representation and court staff includes all judicial branch employees except judges, settlement facilitators, and mediators.

B. Permitted information. When communicating with a self-represented litigant, court staff are permitted to:

- (1) encourage the self-represented litigant to obtain legal advice from a licensed New Mexico attorney without recommending a specific attorney;
- (2) provide information about available pro bono, free or low-cost civil legal services, legal aid programs and lawyer referral services without endorsing a specific service;
- (3) provide information about available statutory or court-approved forms, pleadings and instructions without providing advice or recommendations as to any specific course of action;
- (4) answer questions about what information is being requested on forms without providing the self-represented litigant with the specific words to put in a form;
- (5) provide, orally or in writing, definitions of legal terminology from widely accepted legal dictionaries or other dictionaries, if available, and without advising whether a particular definition is applicable to the self-represented litigant's situation;
- (6) provide, orally or in writing, citations to constitutions, statutes, administrative

Complete document in handout and on nmadr.org.

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4A-100 NMRA. Domestic relations forms; instructions and cautions regarding use of forms.

C. Responsibility of self-represented parties. A self-represented person shall abide by the same rules of procedure and rules of evidence as lawyers. It is the responsibility of a self-represented person to determine what needs to be done and to take the necessary action...

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4A-100 NMRA

O. Role of judge, clerk, and court. **Court clerks can only help you with filing forms with the court; they cannot help you complete them.** The judge makes decisions in your case, but neither the judge nor the judge's staff can give advice to either party, including how to fill out the forms...

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**ABA Section of Dispute Resolution
Committee on Mediator Ethical Guidance**

SODR-2010-2

Question:

Is it appropriate for a mediator who is not a licensed attorney in the state in which he or she is conducting the mediation to prepare a child support worksheet based upon the information supplied by the parties?

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SODR-2010-2

Summary:

A mediator with the experience and training required to competently complete child support worksheets based on the information supplied by the parties could ethically do so, if done consistently with the Standards governing party self-determination and mediator impartiality.

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SODR-2010-2

The mediator should be sensitive to the role he or she is playing when calculating child support and preparing worksheets, either manually or with the help of a computer program. The mediator should also consider the parties' capacity to meaningfully participate during the entire mediation. Similarly, if the mediator acts essentially as a data-entry person, the Committee sees no ethical impediment under the Model Standards to the mediator performing those services.

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SODR-2010-2

The mediator should disclose the implications of that shift in roles and get party consent to the shift in roles or the use of other dispute resolution processes. Finally, before performing child support worksheet services, the mediator should advise the parties to consult other professionals, including lawyers, to help them make informed choices.

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MATERIALS

See also on www.nmadr.org:

- Second Judicial District Court -Court Staff Can-Can'ts
- Michigan Judicial Institute, Employee Guide to Legal Advice

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Part V - Legal Advice

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“What am I warranting?”

- A good mediation process?
- Advice which is legally competent, complete, and correct?
- A document which is legal, enforceable, and durable?
- A service which protects, promotes, and preserves legal rights?

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Florida Rules for Certified & Court Appointed Mediators

Rule 10.370 Advice, Opinions, or Information

- (a) Providing Information. **Consistent with standards of impartiality and preserving party self-determination, a mediator may provide information that the mediator is qualified by training or experience to provide.**
- (b) Independent Legal Advice. **When a mediator believes a party does not understand or appreciate how an agreement may adversely affect legal rights or obligations, the mediator shall advise the party of the right to seek independent legal counsel.**

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Rule 10.370

- (c) Personal or Professional Opinion. **A mediator shall not offer a personal or professional opinion intended to coerce the parties, unduly influence the parties, decide the dispute, or direct a resolution of any issue. Consistent with standards of impartiality and preserving party self-determination however, a mediator may point out possible outcomes of the case and discuss the merits of a claim or defense. A mediator shall not offer a personal or professional opinion as to how the court in which the case has been filed will resolve the dispute.**

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New Mexico Statewide Guidelines for Court-Connected Mediation Services

Guideline V. Ethical standards for mediators

- F. Role of mediator.
 - (1) A mediator should not make decisions for the mediation parties. At no time and in no way should a mediator coerce any mediation party into an agreement or make a substantive decision for any mediation party. **Depending on the mediation model being utilized, a mediator may make suggestions for the mediation parties' consideration, but all decisions should be made voluntarily by the mediation parties themselves.**

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Guideline V

- (2) **The role of a mediator differs substantially from other professional roles. Mixing the role of a mediator and the role of another profession is problematic and should be avoided.**

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Guideline V

- (3) **A clear, complete, written documentation of any agreements made by the mediation parties during mediation is a beneficial service a mediator may offer. If the court requires or the mediation parties request, a mediator may document any agreements made by the mediation parties. Such documentation may be on forms approved by the court, where such forms are available. In documenting an agreement a mediator should be aware of the limitations imposed on the process by the unauthorized practice of law requirements, any applicable ethical requirements, and any other applicable requirements.**

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ABA Section of Dispute Resolution Committee on Mediator Ethical Guidance

SODR-2010-1

C. Conclusion: Drafting the Mediated Settlement Agreement.

The mediator posing the questions focuses most particularly on the issue of whether a lawyer-mediator can draft the mediated settlement agreement in the context of a mediation requested by unrepresented parties to a divorce.

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SODR-2010-1

As the discussion above suggests, **the mediator should be sensitive to the role he or she is playing, whether he or she is competent to provide the requested drafting service, and the parties' capacity to meaningful participate during the entire mediation**, regardless of whether the mediation concerns purely financial issues or includes custody and child support issues...

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SODR-2010-1

The Committee sees no ethical impediment under the Model Standards to the mediator performing a drafting function that he or she is competent to perform by experience or training. **A mediator may, in drafting a mediated settlement agreement or MOU, act as a "scrivener" -- simply memorializing the parties' agreement without adding terms or operative language.**

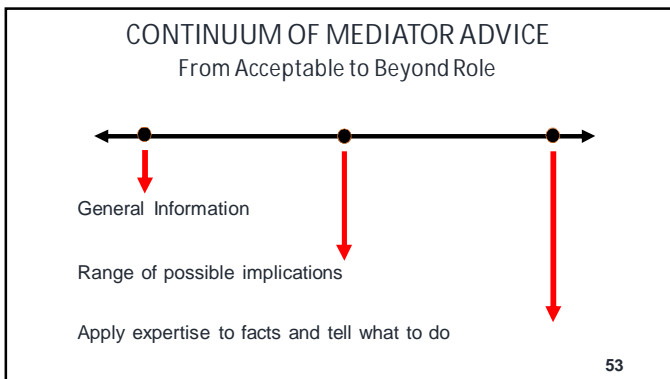
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SODR 2010-1

The Model Standards arguably also permit a mediator to, if she has the necessary background and experience, provide legal information to the parties. **If, however, the mediator puts on his or her legal counsel's hat, by giving legal advice or performing tasks typically done by legal counsel, then the mediator runs the serious risk of inappropriately mixing the role of legal counsel and mediator without disclosing the implications of that shift in roles or without getting party consent.**

In addition, **any drafting activity by a mediator could draw the attention of bodies regulating lawyers or those enforcing restrictions on UPL**

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- ### THE "HOW" MATTERS
- Factors to balance:
- ➡ 1. General information v. interpreting the information**
 - ➡ 2. Preserve even handedness and self-determination**
 - ➡ 3. Protect the nature of the service**
 - ➡ 4. Be transparent regarding any shift in mediator role**
 - ➡ 5. Venture no further than necessary and safe**
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MATERIALS

See also on www.nmadr.org:

- ABA Ethical Opinion SODR 2016, regarding the role of an attorney acting as a Mediator and drafting an agreement
- Power of Mediator Expertise - What is a Mediator to Do?

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Part VI – Confidentiality

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New Mexico Mediation Procedures Act

44-7B-4. Confidentiality

Except as otherwise provided in the Mediation Procedures Act or by applicable judicial court rules, **all mediation communications are confidential, and not subject to disclosure and shall not be used as evidence in any proceeding.**

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44-7B-2. Definitions

44-7B-2. Definitions As used in the Mediation Procedures Act:

B. "mediation communication" means a statement, **whether oral or in a record or verbal or nonverbal, that occurs during a mediation or is made for purposes of considering, conducting, participating in, initiating, continuing or reconvening a mediation or retaining a mediator;**

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44-7B-5. Exceptions; admissibility; discovery

44-7B-5. Exceptions; admissibility; discovery

A. Mediation communications are not confidential pursuant to the Mediation Procedures Act if they:

- (1) are contained in **an agreement reached by the mediation parties during a mediation, including an agreement to mediate**, and the agreement is evidenced by a record signed by the mediation parties, **except** when parts of the agreement are designated by the mediation parties to be confidential or are confidential as otherwise provided by law;
- (2) are **communications that all mediation parties agree may be disclosed**, as evidenced by a record signed by all mediation parties prior to or at the mediation;

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44-7B-5. Exceptions; admissibility; discovery

44-7B-5. Exceptions; admissibility; discovery

- (9) **relate to the administrative facts of the mediation**, including:
 - (a) whether the mediation parties were referred to mediation;
 - (b) whether a mediation occurred or has terminated;
 - (c) the date, time and place of a mediation;
 - (d) the persons in attendance at a mediation; and
 - (e) whether a mediator received payment for the mediation; or
- (10) **relate to whether the parties reached a binding and enforceable settlement in the mediation.**

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National Standards for Court-Connected Mediation Services

12. Communications Between Mediators and the Court

12.1 **During a mediation the judge or other trier of fact should be informed only of the following:**

- a) the failure of a party to comply with the order to attend mediation;
- b) any request by the parties for additional time to complete the mediation;
- c) if all parties agree, any procedural action by the court that would facilitate the mediation; and
- d) the mediator's assessment that the case is inappropriate for mediation.

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Standard 12

12.2 **When the mediation has been concluded, the court should be informed of the following:**

- a) If the parties do not reach an agreement on any matter, the mediator should report the lack of an agreement to the court without comment or recommendation.
- b) If agreement is reached, any requirement that its terms be reported to the court should be consistent with the jurisdiction's policies governing settlements in general.
- c) With the consent of the parties, the mediator's report also may identify any pending motions or outstanding legal issues, discovery process, or other action by any party which, if resolved or completed, would facilitate the possibility of settlement.

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Standard 12

12.3 **Whenever possible, all communications with the judge who will try the case should be made by the parties. Where the mediator must communicate with the trial judge, it is preferable for such communications to be made in writing or through administrative personnel.**

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Files, Data & Confidentiality

How do you store:

- Information related to a referral to mediation?
- Information from screening a case for suitability for mediation?
- Information about what happened during mediation?
- Information from the mediator and program case files?

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Part VII – Family Mediation

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Mediator Qualifications

Myth: "I can mediate anything"

Reality: Subject matter does matter

Areas: Different case types may have different characteristics and dynamics and may require different mediator expertise and techniques.

Training: Basic mediation training is only a general foundation. Additional training for a specialty area is often required.

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Family Mediation

Family (divorce and custody) mediators are often required to have:

- Basic Mediation Training
- Family Mediation Training
- High Conflict and/or Domestic Abuse Training

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Model Standards of Practice for Family and Divorce Mediation

- Overview and Definitions
- Standard I - A family mediator shall recognize that mediation is based on the principle of self-determination by the participants.
- Standard II - A family mediator shall be qualified by education and training to undertake the mediation.
- Standard III - A family mediator shall facilitate the participants understanding of what mediation is and assess their capacity to mediate before the participants reach an agreement to mediate.

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Model Standards

- Standard VIII - A family mediator shall assist participants in determining how to promote the best interests of children.
- Standard IX - A family mediator shall recognize a family situation involving child abuse or neglect and take appropriate steps to shape the mediation process accordingly.
- Standard X - A family mediator shall recognize a family situation involving domestic abuse and take appropriate steps to shape the mediation process accordingly.
- Standard XI - A family mediator shall suspend or terminate the mediation process when the mediator reasonably believes that a participant is unable to effectively participate or for other compelling reasons.

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Model Standards

- Standard IX - A family mediator shall recognize a family situation involving child abuse or neglect and take appropriate steps to shape the mediation process accordingly.
- Standard X - A family mediator shall recognize a family situation involving domestic abuse and take appropriate steps to shape the mediation process accordingly.
- Standard XI - A family mediator shall suspend or terminate the mediation process when the mediator reasonably believes that a participant is unable to effectively participate or for other compelling reasons.

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Part VIII – Domestic Violence

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40-4-8. Contested custody; appointment of guardian ad litem.

40-4-8. Contested custody; appointment of guardian ad litem.

B. When custody is contested, the court:

- (1) shall refer that issue to mediation if feasible unless a party asserts or it appears to the court that domestic violence or child abuse has occurred, in which event the court shall halt or suspend mediation unless the court specifically finds that:

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40-4-8 NMSA

40-4-8. Contested custody; appointment of guardian ad litem.
 ...unless the court specifically finds that:

(a) the following three conditions are satisfied:

- 1) the mediator has substantial training concerning the effects of domestic violence or child abuse on victims;
- 2) a party who is or alleges to be the victim of domestic violence is capable of negotiating with the other party mediation, either alone or with assistance, without suffering from an imbalance of power as a result of the alleged domestic violence; and

in

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40-4-8 NMSA

and...

- 3) the mediation process contains appropriate provisions and conditions to protect against an imbalance of power between the parties resulting from the alleged domestic violence or child abuse; or

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40-4-8 NMSA

or

(b) in the case of domestic violence involving parents, the parent who is or alleges to be the victim requests mediation and the mediator is informed of the alleged domestic violence;

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**New Mexico Statewide Guidelines
for Court-Connected Mediation Services**

GUIDELINE IV. Policies and procedures.

A. Minimum standards. Each court and the Administrative Office of the Courts, if offering court-connected mediation services, should adopt written policies and procedures for the services and the qualifications of mediators. The policies and procedures should at a minimum address the following:

- (7) pre-mediation review of cases for capacity issues including domestic abuse;

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GUIDELINE IV

(8) management of capacity issues—including issues arising from domestic abuse—which are identified at any time during the court-connected mediation services.

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**National Standards for Court-Connected
Mediation Services**

Standard X A family mediator shall recognize a family situation involving domestic abuse and take appropriate steps to shape the mediation process accordingly...

B. A mediator shall not undertake a mediation in which the family situation has been assessed to involve domestic abuse without appropriate and adequate training.

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Standard X

C. Some cases are not suitable for mediation because of safety, control or intimidation issues. A mediator should make a reasonable effort to screen for the existence of domestic abuse prior to entering into an agreement to mediate. The mediator should continue to assess for domestic abuse throughout the mediation process

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Standard X

D. If domestic abuse appears to be present **the mediator shall consider taking measures to insure the safety** of participants and the mediator including, among others:

1. establishing appropriate **security arrangements;**
2. holding **separate sessions** with the participants even without the agreement of all participants;
3. **allowing a friend, representative, advocate, counsel or attorney to attend** the mediation sessions;

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Standard X

4. **encouraging the participants to be represented by an attorney, counsel or an advocate** throughout the mediation process;
5. **referring the participants to appropriate community resources;**
6. **suspending or terminating** the mediation sessions, with appropriate steps to protect the safety of the participants.

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Part IX – Tips, Traps, Tools, and Take Aways

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Ethics for Court-Connected Mediation Programs: Navigating Tricky Waters

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New Mexico Supreme Court General Rules

23-113. Providing court information to self-represented litigants.

A. **Self-represented litigant, court staff; defined.** For purposes of this rule, a self-represented litigant is any person who appears, or is contemplating an appearance, in any court in this state without attorney representation and court staff includes all judicial branch employees except judges, settlement facilitators, and mediators.

B. **Permitted information.** When communicating with a self-represented litigant, court staff are permitted to:

- (1) encourage the self-represented litigant to obtain legal advice from a licensed New Mexico attorney without recommending a specific attorney;
- (2) provide information about available pro bono, free or low-cost civil legal services, legal aid programs and lawyer referral services without endorsing a specific service;
- (3) provide information about available statutory or court-approved forms, pleadings and instructions without providing advice or recommendations as to any specific course of action;
- (4) answer questions about what information is being requested on forms without providing the self-represented litigant with the specific words to put in a form;
- (5) provide, orally or in writing, definitions of legal terminology from widely accepted legal dictionaries or other dictionaries, if available, and without advising whether a particular definition is applicable to the self-represented litigant's situation;
- (6) provide, orally or in writing, citations to constitutions, statutes, administrative rules or regulations, court rules and case law, but are not required to search for the citation and are not permitted to perform legal research as defined in Subparagraph (4) of Paragraph C of this rule or advise whether a particular provision is applicable to the self-represented litigant's situation;
- (7) provide publically available, non-sequestered information on docketed cases;
- (8) provide general information about court processes, procedures and practices, including court schedules and how to get matters scheduled;
- (9) provide information about mediation, parenting courses, courses for children of divorcing parents and any other appropriate information approved by the court for self-represented litigants;
- (10) provide, orally or in writing, information on local court rules and administrative orders;
- (11) provide information regarding proper courtroom conduct and decorum; and
- (12) provide general information about community resources without endorsing a specific resource.

- C. **Prohibited information.** When communicating with a self-represented litigant, court staff are prohibited from:
- (1) providing, orally or in writing, any interpretation or application of legal terminology, constitutional provisions, statutory provisions, administrative rules or regulations, court rules and case law based on specific facts or the self-represented litigant's particular circumstances;
 - (2) providing, orally or in writing, information that must be kept confidential by statute, administrative rule or regulation, court rule, court order or case law;
 - (3) creating documents or filling in the blanks on forms on behalf of self-represented litigants;
 - (4) performing direct legal research by applying the law to specific facts or expressing an opinion regarding the applicability of any constitutional provisions, statutes, administrative rules or regulations, court rules, court orders or case law to the self-represented litigant's particular circumstances;
 - (5) explaining court orders or decisions except as permitted by Subparagraph (8) of Paragraph B of this rule;
 - (6) telling the self-represented litigant what to say in court;
 - (7) assisting or participating in any unauthorized or inappropriate communications with a judge on behalf of the self-represented litigant outside the presence of the other party;
 - (8) indicating, orally or in writing, whether the self-represented litigant should file a case in court;
 - (9) predicting the outcome of a case filed in court; and
 - (10) indicating, orally or in writing, what the self-represented litigant should do or needs to do.

D. **Immunity.** Despite any information provided to self-represented litigants pursuant to this rule, self-represented litigants remain responsible for conducting themselves in an appropriate manner before the court and representing themselves in compliance with all applicable constitutional and statutory provisions, administrative rules or regulations, court rules, court orders and case law. Court staff shall be immune from suit, as provided by statute or common law, for any information provided to a self-represented litigant.