GUIDELINES FOR COURT-CONNECTED MEDIATION SERVICES

GUIDELINE I. Introduction.

These Guidelines for Court-Connected Mediation Services ("Guidelines") are intended to assist the New Mexico Judiciary's efforts to provide court-connected mediation services. Because each local court has unique needs and limitations, these Guidelines may not be applicable in all courts and should not be considered mandatory directives. However, all courts and the Administrative Office of the Courts are encouraged to implement the standards set forth below to the fullest extent possible.

GUIDELINE II. Definitions.

For purposes of these Guidelines, the following definitions apply.

A. "Court-connected mediation services" means any service that provides mediation in court cases and is created or administered by a court or the Administrative Office of the Courts. These services may be provided by a private entity to which a court refers a case for mediation, but do not include mediation services that have not been referred by a court or arranged by the Administrative Office of the Courts.

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

(1) facilitates communication and negotiation between mediation parties to assist them in reaching a voluntary agreement regarding their dispute; or

(2) promotes reconciliation, settlement, or understanding between and among mediation parties.

C. "Mediation communication" means a statement—whether oral, written, 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.

D. "Mediation party" means a person, who participates in a mediation and whose agreement is necessary to resolve a dispute.

E. "Mediator" means an individual who is designated by a court or the Administrative Office of the Courts as a mediator and who conducts a mediation.

F. "Non-party participant" means a person, other than a mediation party or mediator, who is present and who may participate in the mediation. This definition may include a person who is being consulted by a mediation party to assist with evaluating, considering, or generating offers of settlement; who is an observer present to watch and listen to the mediation for educational or other administrative purposes; or who is a mediation program administrator.

G. "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government or governmental subdivision, agency or instrumentality, public corporation, or any other legal or commercial entity.

Comment

General

The definitions of "mediation," "mediation communication," "mediation party," "mediator," "non-party participant," and "person" are derived from the Mediation Procedures Act ("MPA"), NMSA 1978, §§ 44-7B-1 to -6.

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.

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."

Referral by a judge or other court personnel

Paragraph A sets forth the determining characteristic of court-connected mediation services, which is a specific referral by a judge or other court personnel to a particular mediator. The referral may be formal, as in a referral order, informal, as in a direction from the bench, or otherwise. The dispositive question does not turn on who the mediator is, but rather on whether the parties are acting in accordance with specific direction from a court. *See also* Guideline IV (Qualifications of mediators).

Mediation participants

The people who may participate in mediation may have different roles. Paragraph D covers those participants whose agreement is necessary to resolve a dispute. However, in court-connected mediation services, the participants whose agreement is necessary may include the participants who are formally listed as a party to the legal action and may include participants who are not parties to the legal action. There are also participants whose agreement is not necessary, such as legal representatives, subject matter consultants, and others. The Guidelines address these different roles, while providing that certain requirements, such as confidentiality, apply to every participant regardless of role.

Mediation party

The definition of "mediation party" in Paragraph D is adapted from the definition of the same term in the MPA. The definition is much broader than the standard legal definition of "party." *See, e.g.*, Black's Law Dictionary 1010 (5th ed. 1979) ("'Party' is a technical word having a precise meaning in legal parlance; it refers to those by or against whom a legal suit is brought, whether in law or in equity, the party plaintiff or defendant, whether composed of one or more individuals and whether natural or legal persons; all others who may be affected by the suit, indirectly or consequently, are persons interested but not parties."); *cf.* Rule 1-004(B) NMRA ("The summons shall be substantially in the form approved by the Supreme Court and must contain: (1) the name of the court in which the action is brought, the name of the county in which the complaint is filed, the docket number of the case, the name of the first party on each side, with an appropriate indication of the other parties, and the name of each party to whom the summons is directed; . . . .").

Participants who are not parties to the legal action

The definitions of "mediation party" and "non-party participant," in Paragraphs D and F respectively, are adapted from the definitions of the same terms in the MPA. These terms originated in the literature, such as the Uniform Mediation Act, where the distinction between those parties who are named in the caption of a legal action were not distinguished from those parties whose agreement is necessary to resolve a dispute.

In some circumstances, the resolution of a dispute may require the participation in mediation of persons not a party to the legal action to reach an agreement that will resolve the issues. Courts and mediators may consider, under some circumstances, inviting these persons to participate in mediation. These persons are therefore included in the definition set forth in Paragraph D of "mediation party."

In some circumstances, there may be participants in the mediation who are neither named in the caption of a legal action, nor whose agreement is necessary to resolve a dispute. These participants are covered in Paragraph F as a "non-party participant," and may include the following:

- Non-party participants may include attorneys, counselors, or advocates present at the request of the named parties in accordance with Guideline III(C), below.

- If the mediation parties agree, courts may also provide for the presence of observers for administrative or educational purposes. For instance, a court may provide for mentoring or coaching of less-experienced mediators through attendance and observation of mediation sessions, subject to the agreement of the mediation parties.

- Non-party participants should be bound by the confidentiality provisions set forth in Guideline III(D), below. Non-party participants by definition are not bound by the mediation agreement, if any.

Because mediation party self-determination is the core value of court-connected mediation services, the mediation parties have control of who is present during the mediation. Ideally, mediation parties who want to include a non-party participant in the mediation will raise the question with the other mediation parties and the mediator before the mediation session. Sometimes, however, a mediation party will simply bring a non-party to the mediation session without prior disclosure or discussion. If the presence and participation of non-parties has not been worked out in advance of mediation, reaching consensus on the presence and participation of non-parties is one of the first issues to be addressed at the mediation. If the mediation parties cannot reach consensus as to the presence and participation of the non-parties, the objecting mediation party ultimately has the right to opt out of the mediation.

In the case of observers, any mediation party may decline to have them present.

GUIDELINE III. General principles.

These Guidelines suggest minimum standards for all courts offering court-connected mediation services. Nothing in these Guidelines is intended to preempt any Supreme Court rule that addresses mediation or settlement facilitation.

A. **Applicability.** These Guidelines apply only to court-connected mediation services. They are not intended to apply to settlement conferences held by judges or to mediations in which disputants independently retain a private mediator.

B. **Court-connected mediation services policies and procedures.** Courts or the Administrative Office of the Courts in offering court-connected mediation services should adopt written policies and procedures consistent with these Guidelines for the implementation and conduct of their programs.

C. **Self-determination.** In self-determination, the decision-making authority rests with the mediation parties themselves. Self-determination is the core value of court-connected mediation services.

(1) Courts may mandate referral to mediation, but should not require mediation parties to settle. There should be no adverse response by courts to non-settlement by the mediation parties. For that reason, mediation parties should be permitted to opt out of mediation at any time.

(2) A mediator should facilitate negotiations between mediation parties and assist them in trying to reach a settlement, but should not have the authority to impose a settlement on the mediation parties or to coerce them into settlement.

D. **Confidentiality.** Except as otherwise provided in the Mediation Procedures Act, NMSA 1978, §§ 44-7B-1 to -6, or by applicable law, all mediation communications should be deemed confidential, should not be subject to disclosure, and should not be used as evidence in any proceeding. Mediators, mediation parties, and non-party participants should be bound by a rule of confidentiality. Nothing in these Guidelines, however, should prevent the discovery or admissibility of any evidence that is otherwise discoverable or admissible, merely because the evidence was presented during a mediation.

E. **Immunity of mediators.** A mediator, as defined in these guidelines, should be considered an arm of the court and as such should be immune from liability for conduct within the scope of the mediator's appointment.

F. **Access to court-connected mediation services.** All litigants should have access to court-connected mediation services without discrimination on the basis of race, ethnicity, color, creed, gender, gender identity, sexual orientation, marital status, national origin, or physical or mental ability.

G. **Compliance with Language Access Plan.** Court-connected mediation services and information to the public, the bar, judges, and court personnel about these services should be provided in a manner that complies with the court's Language Access Plan.

H. **Information.** A court should provide information to the public, the bar, judges, and court personnel about the availability and procedures of its court-connected mediation services.

Comment

General

These Guidelines set forth recommendations to courts for providing court-connected mediation services. These Guidelines recognize that court-connected mediation services need to be designed and implemented in ways that accommodate local needs and circumstances while maintaining consistently high quality.

Confidentiality

Courts should be certain that their court-connected mediation services comply with the confidentiality requirements of the Mediation Procedures Act.

Domestic Relations Mediation

The Domestic Relations Mediation Act (DRMA), NMSA 1978, §§ 40-12-1 to -6, allows courts to, among other things, establish domestic relations mediation programs. Rule 1-125 NMRA, applies to court-connected mediation services established under the DRMA. Where applicable, these Guidelines complement Rule 1-125. Additional statutes address mediation in family cases. *See* NMSA 1978, §§ 40-4-8(B), 40-4-9.1(G). These statutes direct courts to refer contested custody cases to mediation "if feasible."

Additional Service Areas and Fees

Courts are encouraged to be knowledgeable regarding the statutes and rules which will apply to their specific program(s), including whether there is authority to assess fees to the user(s) of the service. For example, there are different statutes and rules which apply to Magistrate Courts and the Metropolitan Court, and there are different statutes and rules which apply to fees for civil, domestic relations, and other cases.

Standards

Courts are encouraged to exceed the minimum standards set forth in these Guidelines whenever possible. When developing or modifying existing court-connected mediation services, courts are encouraged to refer to various relevant national standards, including those set forth below.

- The National Standards for Court-Connected Mediation Programs were developed in 1993 by the Center for Dispute Settlement in Washington, D.C., and the Institute of Judicial Administration in New York City, through a grant from the State Justice Institute. The National Standards are available at http://courtadr.org/files/NationalStandardsADR.pdf.

- The Model Standards of Practice for Family and Divorce Mediation were developed in 2000 by the Symposium of Standards of Practice and are available at: http://www.afccnet.org/ResourceCenter/CenterforExcellenceinFamilyCourtPractice/ctl/ViewCommittee/CommitteeID/17/mid/495.

- The Model Standards of Conduct for Mediators (2005) were developed by the American Arbitration Association, the American Bar Association's Section of Dispute Resolution, and the Association for Conflict Resolution and are available at: http://www.americanbar.org/content/dam/aba/migrated/dispute/documents/model_standards_conduct_april2007.

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;

(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.

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.

C. **Disclosure of information from mediation.**

(1) **In general.** Policies and procedures regarding mediation services should not require disclosure of information from a mediation pursuant to Paragraph III(D).

(2) **Exceptions.** Notwithstanding Subparagraph (C)(1) of this Guideline, disclosure may be required of information pursuant to the Mediation Procedures Act, whether as an exception stated in the Mediation Procedures Act or as an additional or different exception which is created pursuant to an authorizing provision of the Mediation Procedures Act.

D. **Supervision of court-connected mediation services.** The court should designate a particular person or persons to be responsible for administration of its court-connected mediation services or to act as liaison with private, court-referred mediators.

Comment

General

This Guideline is intended to encourage courts to consider and determine how best to address the listed items given the needs and resources of a particular court. It is not intended to instruct courts on how to exercise their discretion. For example, policies and procedures for child custody court-connected mediation services in one district court may refer all divorce and parentage cases involving minor children to court staff to develop custody and timesharing agreements. Another district court might refer all such cases to private mediators for the same purpose. And yet another district court might refer only cases in which the parents have filed a request for referral to mediation.

Capacity to mediate

Subparagraph (A)(8), together with Guideline V(G), concerns the mediation parties' capacity to mediate. Subparagraph (A)(8) of this Guideline encourages courts to consider capacity issues when developing court-connected mediation services. Guideline V(G) addresses mediators' potential obligations regarding capacity issues that may be identified during mediation.

"Capacity" in its broadest sense refers to "the ability to understand the nature and effects of one's acts." Black's Law Dictionary 188 (5th ed. 1979). In mediation, capacity includes the ability to understand and to participate in the mediation process. Capacity is therefore crucial to expression of the core mediation value of mediation party self-determination. If mediation parties do not understand the process, issues, or settlement options, or have difficulty participating in mediations, their capacity to mediate, and by extension, their ability to make decisions in their own best interests, are adversely affected.

- Mediation should only take place in cases, or regarding issues, where all mediation parties have the capacity to exercise self-determination during the mediation process.
- The concept of capacity to mediate is neither intended to be a mental health diagnosis nor a specific judicial finding.

- Capacity to mediate potentially implicates a wide array of impediments. For example, the mediation process may be impeded by domestic abuse; neglect or abuse of a child; status as a protected individual or vulnerable adult; mental illness, brain injuries, or other mental impairment; and impairment from alcohol or other substances.
- Some forms of incapacity to mediate may be temporary, such as intoxication, and mediation may be rescheduled for another time. Other forms of incapacity to mediate may be longer term, such as mental illness, brain injury, or a history of domestic abuse, and may mean that mediation should be avoided altogether.
- Assessment of a mediation party's capacity to mediate is an on-going process in each case in which both courts and mediators have a role.

Courts should recognize that capacity issues may impact a mediation party's ability to exercise self-determination in the mediation process. They should consider whether and what kind of pre-referral review should be performed, and how and whether mediation should proceed in each case. States and mediation programs vary greatly in their approach to pre-referral review and may decide, for instance, to adopt a wide range of options, including any of the practices or procedures listed below. Courts should recognize that the range of options is extensive, and that continuing advances in the field are causing best practices regarding capacity issues to evolve. Some options in current use include:

- All cases should be reviewed prior to referral and throughout mediation.
- Only a certain type of case, e.g., domestic relations, should be reviewed prior to a referral and throughout mediation.
- When a review of the pleadings suggests a concern regarding capacity, a case would be reviewed prior to referral and throughout mediation.
- When a mediation party is unrepresented by counsel, regardless of the type of case, the case should be reviewed prior to referral and during mediation.
- The burden of informing the court and the mediator of capacity issues rests entirely on a mediation party, or the burden is a shared responsibility among the mediation parties, their advisors, and the mediator and court.
- Review for capacity issues may be as rudimentary as an Odyssey search or a questionnaire given to the legal parties and mediation parties, or as in-depth as a face to face meeting with each person potentially participating in the mediation with the mediator or program staff.

Mediators should be trained to recognize capacity issues including domestic abuse so that they can take appropriate action if such an issue appears during mediation.

Domestic abuse and capacity

"Domestic abuse" can be defined in a variety of ways. It can mean different things in different contexts, and various statutes define it differently. The U.S. Department of Justice, Office on Violence Against Women, defines domestic violence as follows:

> [A] pattern of abusive behavior in any relationship that is used by one partner to gain or maintain power and control over another intimate partner. Domestic violence can be physical, sexual, emotional, economic, or psychological actions or threats of

> actions that influence another person. This includes any behaviors that intimidate, manipulate, humiliate, isolate, frighten, terrorize, coerce, threaten, blame, hurt, injure, or wound someone.

http://www.ovw.usdoj.gov/domviolence.htm.

Although other issues may affect the capacity to mediate, domestic abuse is an issue specifically identified in statutes or rules in New Mexico and in other states.

Some states by statute, court rule, or Supreme Court publication, either explicitly or implicitly, require screening for domestic abuse.

- The Nebraska legislature requires mediators to screen for enumerated capacity issues prior to meeting with the parties. *See* Neb. Rev. Stat. § 43-2939 (2007).
- The New Mexico Legislature has prohibited mediation in child custody cases where "a party asserts or *it appears to the court* that domestic violence or child abuse has occurred," unless certain enumerated conditions are met. NMSA 1978, § 40-4-8(B) (Emphasis added.)
- The Ohio Supreme Court requires that local mediation rules include "[p]rocedures for screening for domestic violence both before and during mediation." Sup. R. 16(B)(1) (Rules of Superintendence for the Courts of Ohio).
- Michigan Supreme Court's Office of Dispute Resolution has authored a publication (revised June 2014) entitled "Domestic Violence Screening Protocol for Mediators of Domestic Relations Conflicts."

Courts also should be aware that there are many terms which are used to describe domestic abuse or domestic violence. The following statutes provide some examples of other definitions:

- Family Violence Protection Act, NMSA 1978, § 40-13-2(D), (C);
- Crimes Against Household Members Act, NMSA 1978, §§ 30-3-10 to -18 (enumerated crimes);
- NMSA 1978, § 40-4-8; and
- Violence Against Women Act, 42 U.S.C. § 1392(a)(6).

Notably, domestic abuse may influence parties not only in family cases but also in such seemingly unrelated cases as landlord-tenant or personal injury. For example, the injured party in a personal injury case may be in a relationship where domestic violence is present, and the non-party partner is controlling the injured party's decisions regarding procedure of the case.

Courts may decide that cases involving domestic abuse or other capacity issues should not be referred to mediation; they may decide to leave the door open to judicial discretion in referral decisions; or they may decide specific approaches to be used in handling a referral.

Screening for capacity issues

Screening for capacity to mediate is an evolving concept in the mediation field, and development of screening protocols and tools is on-going. At this time, some screening protocols

have been developed for domestic abuse, and additional protocols continue to emerge. Screening for domestic abuse may enhance both the quality of court-connected mediation services provided and the safety of mediation participants. The extent of screening will vary according to the nature of each case and the resources available to a court. Screening alone, however, is insufficient; the decisions made, based upon the screening results, are critical.

Some states, including Michigan, use screening in mediation to identify domestic abuse.

- The Michigan Supreme Court's Domestic Violence Screening Protocol opens with the following:

> The purpose of this screening protocol is to protect the safety of mediation participants and the integrity of the mediation process. The protocol is designed to identify parties involved in divorce or child custody actions for when mediation may be inappropriate because of domestic violence or child abuse, and to maximize safety in the mediation process.

Michigan Supreme Court, State Court Administrative Office, Office of Dispute Resolution, *Domestic Violence Screening Protocol for Mediators of Domestic Relations Conflicts (June 2014)*, http://courts.mi.gov/Administration/SCAO/Resources/Documents/standards/odr/Domestic%20Violence%20Screening%20Protocol.pdf.

Some states, including New Mexico, have statutory language that can only be fulfilled with sufficient screening:

- NMSA 1978, Section 40-4-8(B), directs that contested child custody cases be referred 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:
>
> (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 in mediation, either alone or with assistance, without suffering from an imbalance of power as a result of the alleged domestic violence; *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*
>
> (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.

(Emphasis added.)

Opting out of mediation

Mediation party self-determination is the core value of court-connected mediation services. For this reason, Guideline III(C) incorporates a strong opt-out provision to allow mediation parties who do not feel comfortable going forward for any reason to opt out of the mediation rather than be coerced into attending. Paragraph (A)(9) of this Guideline explicitly encourages courts to develop procedures to allow mediation parties to opt-out of mediation.

Further, in light of *Carlsbad Hotel Associates, L.L.C. v. Patterson-UTI Drilling Company*, 2009-NMCA-005, 145 N.M. 385, 199 P.3d. 288, good faith participation should not be required by any court-connected mediation services.

In the event a court is considering whether and how to enforce an order to mediation, the court should give careful consideration to the critical distinction between "objectively measurable noncompliance" and a "subjective determination of bad faith." *See* ABA Section of Dispute Resolution, *Resolution on Good Faith Requirements for Mediators and Mediation Advocates in Court-Mandated Mediation Programs* (Aug. 7, 2004), http://www.abanet.org/dispute/draftres2.doc.

Qualifications of mediators

Many states with rules governing court-connected mediation services require a minimum of a 40-hour basic mediation training plus annual continuing education for mediators providing court-connected mediation services. Given the limited availability of mediation training outside of Santa Fe and Albuquerque, and the consequent shortage of trained mediators outside of Santa Fe and Albuquerque, these Guidelines do not recommend specific training or recommend how courts should qualify their mediators. Paragraph B of this Guideline, however, encourages courts to consider the qualifications a mediator should have to competently mediate and whether qualifications should be tailored for case type.

There presently is no single, commonly accepted body that certifies or establishes qualifications or credentials for mediators

Professional development

Examples of professional development for mediators may include mentoring and observation by skilled and experienced mediators, workshops, emailed "tips" and information, roundtable discussions, advanced mediation training, webinars, conference calls, email 'list serves,' participant surveys, books, and written articles.

Disclosure of information from mediation

In addition to the recommended limitations on the disclosure of information set forth in Paragraph C of this Guideline, Guideline III(D) provides that mediation communications should be

deemed confidential, should not be subject to disclosure, and should not be used as evidence in any proceeding. Further, court-connected mediation services are within the scope of the Mediation Procedures Act. Courts should be certain that their court-connected mediation services comply with the confidentiality requirements of the Mediation Procedures Act.

Supervision of court-connected mediation services

Designation of a specific person or persons to be responsible for administering the court-connected mediation services ensures consistency of application, thereby avoiding any appearance of arbitrariness or capriciousness while still protecting the discretion of judges to refer or not refer cases to mediation.

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.

A. **Impartiality.** Impartiality is at the heart of a mediator's ethical responsibilities. A mediator should maintain impartiality toward all mediation parties. Impartiality means freedom from favoritism or bias either by appearance, word, or action, and a commitment to serve all mediation parties as opposed to a single mediation party. At a minimum, a mediator should comply with the following:

(1) a mediator should not accept or give a gift, request, favor, loan, or any other item of value to or from a mediation party or non-party participant involved in any pending or scheduled mediation process, except that a mediator may accept payment of fees for court-connected mediation services; however, a mediator may accept or give de minimis gifts or incidental items or services that are provided to facilitate a mediation or respect cultural norms so long as such practices do not raise questions as to a mediator's actual or perceived impartiality;

(2) a mediator should not use information disclosed during the mediation process for private gain or advantage, nor should a mediator seek publicity from a mediation effort to enhance the mediator's position; and

(3) if at any time a mediator is unable to conduct a mediation in an impartial manner, the mediator should withdraw.

B. **Conflict of interest.** A conflict of interest arises when any relationship between the mediator and the mediation parties or non-party participants, or the subject matter of the dispute compromises or appears to compromise the mediator's impartiality. A mediator should refrain from entering into or continuing in any dispute if he or she perceives that participation as a mediator would be a conflict of interest or create an appearance of a conflict of interest. A mediator should avoid a conflict of interest or the appearance of a conflict of interest during and after a mediation.

(1) A mediator should disclose a known, significant relationship with any mediation party or non-party participant involved in the mediation, whether the relationship is current or past, or personal, professional, or pecuniary in nature. If a mediator has represented, treated, or advised any mediation party or non-party participant in any capacity, the mediator should disclose that professional relationship. A mediator should disclose any clear or potential conflict of interest as soon as practical after the mediator becomes aware of it.

(2) After a mediator discloses a current or prior personal or professional relationship or pertinent pecuniary interest, the mediation parties may choose to continue with the mediator.

(3) The duty to disclose should be a continuing obligation throughout the mediation process.

C. **Representations by mediator.** A mediator should not make inaccurate statements about the mediation process, its costs and benefits, or the mediator's qualifications, including the following:

(1) a mediator should not make claims of specific results or promises which imply favor of one mediation party over another;

(2) a mediator should not offer any promises about the outcome of a mediation in a communication, including on a business card, stationery, or in a computer-based communication;

(3) a mediator should refrain from promises and guarantees of results and should not advertise statistical settlement data or settlement rates; and

(4) a mediator should accurately represent her or his qualifications. A mediator should only claim to meet the mediator qualifications of a governmental entity or private organization if that entity or organization has a recognized procedure for qualifying mediators and it specifically grants such status to the mediator.

D. **Disclosure of Fees.** When costs and fees are paid by the mediation parties directly to the mediator, the mediator should provide written information to the mediation parties that includes costs, fees, and time and manner of payment. The mediation parties and the mediator should enter into a written agreement that describes costs, fees, and time and manner of payment before beginning the mediation—even if the mediator's fees are set by court order. The assessment of fees should comply with the following:

(1) no commissions, rebates, or other similar forms of remuneration should be given or received by a mediator for the referral of clients; and

(2) fees should not be based on the outcome of the mediation. A mediator should not enter into a fee agreement which is contingent upon the result of the mediation or the amount of the settlement.

E. **Confidentiality.** Mediators for court-connected mediation services should comply with the confidentiality requirements of the Mediation Procedures Act.

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.

(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.

(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.

(4) If the mediation parties are not represented by counsel at the mediation, the mediator should afford them the opportunity for review of any agreement by an independent attorney or other consultant before it is signed.

G. **Capacity to mediate.**

(1) If a mediation party appears to have difficulty comprehending the process, issues, or settlement options, or difficulty participating in a mediation, the mediator should explore the circumstances and potential accommodations, modifications, or adjustments that would make possible the mediation party's capacity to comprehend, participate, and exercise self-determination.

(2) If a mediator is made aware of domestic abuse or violence among the mediation parties or non-party participants, the mediator should take appropriate steps including, if necessary, postponing, withdrawing from, or terminating the mediation.

Comment

This Guideline draws from the sources set forth below, as well as from provisions in New Mexico statutes and mediator ethical codes from other states. Standard 8.1 of the National Standards for Court-Connected Mediation Programs provides: "Courts should adopt a code of ethical standards for mediators, together with procedures to handle violations of the code." The Commentary to Standard 8.1 elaborates: "In creating a code of ethics, courts should consider the dual purposes of such a code: the promotion of honesty, integrity and impartiality in mediation, and the effective operation of a mediation program. . . . Each court should consider existing standards when drafting its code." After reference to many codes of ethics adopted by courts and professional associations throughout the country, Standard 8.1 concludes that any set of standards for mediators should address the following six areas: impartiality, conflict of interest, advertising by mediators, disclosure of fees, confidentiality, and role of mediators in settlement.

The Model Standards of Conduct for Mediators set forth standards in nine areas, including self-determination, impartiality, conflicts of interest, competence, confidentiality, quality of the process, advertising and solicitation, fees and other charges, and advancement of mediation practice.

The Model Standards of Practice for Family and Divorce Mediation provide standards addressing self-determination, qualifications of mediators, impartiality, fees, confidentiality, advertising, competence, and several other standards relating to the quality of process and families in particular.