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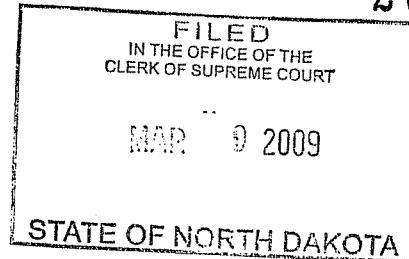
MAR 06 2009

Joanne H. Ottmar  
Timothy J. Ottmar

Steven T. Ottmar

March 5, 2009

North Dakota Supreme Court  
600 E. Boulevard Ave., Dept. 180  
Bismarck, ND 58505-0530



RE: Mediation ethics and enforcement rules

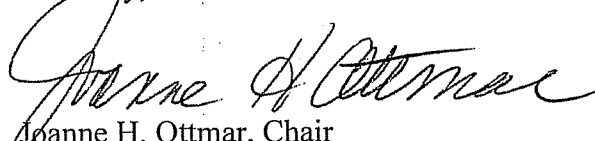
Members of the Court:

The Joint Committee on Alternative Dispute Resolution, created under Administrative Rule 43, was asked by the Supreme Court to prepare proposed rules regarding professional conduct for mediators, as required by Section 3. A. 3. of AR 43. The Committee, after considering rules promulgated in other jurisdictions, has developed the enclosed drafts. They are forwarded to the Court for your consideration. In preparing these documents, the Committee's goals were to address issues of concern for mediators and their clients, and to maintain procedural simplicity in the enforcement process.

These drafts were submitted to the Board of Governors of the State Bar Association for review and comment before submission of final recommendations to the Court. The Board of Governors suggested the addition of a comment to Rule III, reminding lawyer-mediators they are also governed by Rules of Professional Conduct regarding conflicts. The Committee incorporated a comment as suggested. The Board of Governors also questioned the authority of the Court to discipline non-lawyer mediators in the absence of a certification program. The Committee believes this is a matter for the Court's consideration, and not the Committee's.

The Committee thanks you for the opportunity to work on these proposed rules, and stands ready to serve in any other way that may be helpful.

Sincerely,



Joanne H. Ottmar, Chair  
Joint Committee on Alternative Resolution

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## **ND CODE OF MEDIATION ETHICS**

**Final Draft – January 27, 2009**

FILED  
IN THE OFFICE OF THE  
CLERK OF SUPREME COURT

MAR 9 2009

### **Introduction**

Rule 8.8 of the North Dakota Rules of Court encourages civil litigants to consider using alternative dispute resolution processes to settle disputes at an early stage of a civil case. Rule 8.9, N.D.R.Ct., provides for a roster of neutrals conducting ADR processes, including mediators. The ND State Court Administrators Office oversees the neutrals roster and individuals and organizations approved for roster inclusion are subject to the jurisdiction of the Administrator's office and to compliance with this Code of Ethics.

The purpose of this Code of Ethics is to provide standards of ethical conduct to guide mediators who provide mediation services, to inform and protect consumers of mediation services, and to ensure the integrity of the mediation process. In order for mediation to be effective, there must be broad public confidence in the integrity of the process. Mediators have a responsibility not only to the parties and the legal system, but also to the continuing improvement of the process. They must observe high standards of ethical conduct. These provisions should be construed to advance these objectives.

Mediators should orient the parties to the process before beginning a mediation. Mediators must not practice, condone, facilitate, or promote any form of discrimination on the basis of race, color, creed, religion, national origin, sex, marital status, economic status, disability, sexual orientation, or age. Mediators must be aware that cultural differences may affect a party's values, decisions, and conduct in mediation.

This introduction serves as a general orientation to the Code of Ethics. Comments accompanying any rule explain and illustrate the meaning and purpose of the rule. They are guides to interpretation but the text of each rule is authoritative. Failure to comply with any provision in this Code may be the basis for removal from the roster of neutrals maintained by the State Court Administrator's Office and/or for such other action as may be taken by the North Dakota Supreme Court or the State Bar Association of North Dakota, or other professional organizations.

Violation of a provision of this Code shall not create a cause of action nor shall it create any presumption that a legal duty has been breached. Nothing

in this Code should be deemed to establish or augment any substantive legal duty on the part of mediators.

### **Rule I. Self-Determination**

A mediator shall recognize that mediation is based on the principle of self-determination by the participants. It requires that the mediation process rely upon the ability of the participants to reach a voluntary, informed, uncoerced agreement. A mediator shall inform the participants that they may seek information and advice from a variety of sources during the mediation process. The primary responsibility for the resolution of a dispute and the shaping of an agreement rests with the parties. A mediator shall not require a participant to stay in the mediation against the participant's will. A mediator shall inform the participants that they may withdraw from mediation at any time, and are not required to reach an agreement in mediation.

#### **Comments**

1. The mediator may provide information about the process, raise issues, offer opinions about the strengths and weaknesses of the case, draft proposals, and help parties explore options. Parties should be given the opportunity to discuss issues important to them and consider all proposed options. It is acceptable for the mediator to suggest options in response to the parties' requests, but not to coerce the parties to accept any particular option.
2. The mediator's commitment shall be to the participants and the process. Pressure from outside of the mediation process shall never influence the mediator to coerce participants to settle.
3. A mediator cannot personally ensure that each party has made a fully informed choice to reach a particular agreement, but it is a good practice for the mediator to make parties aware of the importance of consulting other professionals, where appropriate, to help them make informed decisions.
4. A mediator should be alert to the capacity and willingness of the participants to mediate before proceeding with the mediation and throughout the process. A mediator should not conduct mediation if a mediator reasonably believes that a participant is unable or unwilling to participate due to lack of safety, capacity, or if the any party is experiencing undue influence.

### **Rule II. Impartiality**

A mediator shall conduct the mediation process in an impartial manner and shall serve only in those matters in which the mediator can remain impartial and evenhanded. Impartiality means freedom from favoritism or bias in word, action or appearance, and includes a commitment to assist all participants as opposed to any one individual or perspective. If at any time

the mediator is unable to conduct the process in an impartial manner, the mediator shall withdraw.

#### **Comments**

1. A mediator should guard against bias, prejudice or partiality based on the participants' personal characteristics, background, or performance at the mediation.
2. A mediator shall withdraw if the mediator believes that the mediator's impartiality has been compromised.

### **Rule III. Conflicts of Interest**

A mediator shall disclose all actual and potential grounds of bias and conflicts of interest reasonably known to the mediator. The participants shall be free to retain the mediator by an informed, written waiver of the conflict of interest. However, if a bias or conflict of interest clearly impairs a mediator's impartiality, the mediator shall withdraw regardless of the express agreement of the participants. The need to protect against conflicts of interest shall govern conduct that occurs during and after the mediation process. Without the consent of all participants, and for a reasonable time under the particular circumstances, a mediator who also practices in another profession shall not establish a professional relationship in that other profession with one of the participants in a substantially factually related matter.

#### **Comments**

1. A conflict of interest is any direct or indirect financial or personal interest in the outcome of the proceeding or any existing or past financial, business, professional, family, or social relationship which is likely to affect impartiality or might reasonably create an appearance of partiality or bias. If all parties agree to proceed after being informed of conflicts, the mediator may proceed with the case. If, however, the mediator believes the conflict of interest would inhibit the mediator's impartiality, the mediator should decline to proceed.
2. A mediator should identify and disclose potential grounds of bias or conflict of interest upon which a mediator's impartiality might reasonably be questioned. Such disclosure should be made prior to the start of mediation and allow time for participants to select an alternate mediator. A mediator should resolve all doubts in favor of disclosure. All disclosures should be made as soon as practical after the mediator becomes aware of the bias or potential conflict of interest. The duty to disclose is a continuing duty.
3. In deciding whether to establish a relationship with one of the participants in an unrelated matter, the mediator should exercise caution in circumstances which would raise legitimate questions about the integrity of the mediation process.

4. A mediator should avoid conflicts of interest in recommending the services of other professionals to the participants.
5. A mediator should withdraw if the mediator believes a conflict of interest has been identified and has not been waived by the participants.
6. A mediator who is also a lawyer must bear in mind that North Dakota Rules of Professional Conduct, including Rules 1.7 and 1.12, will also apply to aspects of the lawyer's practice as a mediator.

#### **Rule IV. Confidentiality**

Any communication, verbal or written, in a mediation process is confidential and inadmissible as evidence in any proceeding unless disclosure is required by law. The mediator shall disclose a participant's threat of suicide or violence against any person to the threatened person and the appropriate authorities if the mediator believes such threat is likely to be acted upon.

Additionally, it shall not be considered a violation of confidentiality for the mediator to disclose notes, records, or recollections of the mediation process to the extent that the mediator reasonably believes necessary:

- a) to defend against a complaint filed against the mediator for misconduct as part of the grievance process;
- b) to secure legal advice about the mediator's compliance with these rules.

#### **Comments**

1. A mediator shall discuss issues of confidentiality with the participants before beginning the mediation process, including limitations on the scope of confidentiality, and the extent of confidentiality provided in any private sessions that a mediator holds with a party. Prior to undertaking the mediation, the mediator should inform the participants of the limitations of confidentiality such as statutory, judicially, or ethically mandated reporting. The scope of confidentiality should be discussed with the parties and include their expectations of confidentiality of each other. The written *agreement to mediate* should include provisions concerning confidentiality.
2. If a mediator believes disclosure of suicide or violence is required, a mediator should use appropriate safeguards in doing so in order to protect all involved. Additionally, if a mediator has reasonable grounds that a child of the participants or a vulnerable adult is abused or neglected within the meeting of North Dakota abuse and neglect laws, the mediator shall comply with applicable protection and reporting laws.
3. A mediator may not be a witness and the notes and work product of a mediator are not subject to discovery or subpoena in related legal proceedings. If subpoenaed or otherwise noticed to testify or produce documents, the mediator

should inform the participants immediately, and should not testify or provide documents in response to a subpoena without an order of the court.

### **Rule V. Qualifications & Competence**

A mediator shall be qualified by education, training and experience to undertake the mediation. Mediators must provide information regarding their relevant training, education and experience to the participants.

#### **Comments**

1. Any person who offers mediation services shall give the parties and the public the expectations that she/he is competent to serve effectively as a mediator. A mediator should decline appointment, request technical assistance, or withdraw from any case that is beyond the mediator's competence.
2. Mediators should continuously improve their professional skills and abilities by, among other activities, participating in relevant continuing education programs, and should regularly engage in self-assessment.
3. Mediators should participate in programs of peer consultation and help mentor the work of less experienced mediators.
4. Mediators should continuously strive to understand the impact of culture and diversity on the mediator's practice.

### **Rule VI. Quality of the Process**

A mediator shall work to ensure a quality process. A quality process requires a commitment by the mediator to diligence, timeliness, and responsiveness to the parties and the process. A mediator shall not knowingly make false statements of fact or law.

#### **Comments**

1. A mediator shall be prepared to commit the attention essential to the mediation process. A mediator should satisfy the reasonable expectations of the parties concerning the timing of the process.
2. A mediator should refrain from the unauthorized practice of therapy or law, and from representing any party as an advocate while acting as a mediator. A mediator has a duty to protect the integrity of the mediation process despite external pressure from the legal system, agencies, parties, or non-parties.
3. A mediator should withdraw from mediation or postpone a session if the process is being used to further illegal conduct or to gain unfair advantage, or if a party is unable to participate due to drug or alcohol abuse, threats of violence impacting safety of the participants, or other physical or mental incapacity.
4. If a mediator does suspend or terminate mediation, the mediator should take reasonable steps to minimize prejudice or inconvenience to the participants which may result.

**Rule VII. Advertising and Solicitation**

A mediator shall be truthful in advertising and solicitation for mediation. A mediator shall make only accurate and truthful statements about any mediation process, its cost and benefits, the mediator's role and qualifications. A mediator shall refrain from promising specific results.

In an advertisement or other communication to the public, a mediator who is on the Rule 8.9 Roster of ADR Neutrals may use the phrase "qualified under Rule 8.9(b) of the North Dakota Rules of Court". It is not appropriate to identify oneself as a "certified" mediator under North Dakota Rules of Court.

**Rule VIII. Fees**

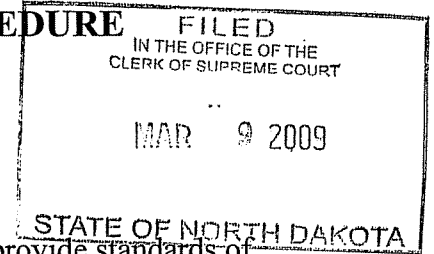
A mediator shall fully disclose and explain the basis of compensation, fees and charges to the participants. The participants shall be provided sufficient information about fees at the outset to determine if they wish to retain the services of the mediator. A mediator shall not enter into a fee agreement which is contingent upon the outcome of the mediation process. A mediator shall not give or receive any commission, rebate, or similar remuneration for referring a person for mediation services.

**Comments**

1. The better practice in reaching an understanding about fees is to set down the arrangements in a written agreement.
2. A mediator who withdraws from a case should return any unearned fees to the parties.
3. A mediator may take reasonable steps under the law to enforce the fee agreement with the parties at the conclusion of the mediator/client relationship.

## CODE OF ETHICS ENFORCEMENT PROCEDURE

Final Draft – January 27, 2009

**Introduction**

The purpose of the Code of Ethics and Enforcement Procedure is to provide standards of ethical conduct to guide mediators who provide mediation services, to inform and protect consumers of mediation services, and to ensure the integrity of the mediation process. In order for mediation to be effective, there must be broad public confidence in the integrity of the process. Mediators have a responsibility not only to the parties and the legal system, but also to the continuing improvement of the process. They must observe high standards of ethical conduct. These provisions should be construed to advance these objectives.

Failure to comply with any provision in the Code of Ethics may be the basis for removal from the roster of mediators maintained by the State Court Administrator's Office and/or for such other action as may be taken by the North Dakota Supreme Court or the State Bar Association of North Dakota, or other professional organizations. Violation of a provision of this Code shall not create a cause of action nor shall it create any presumption that a legal duty has been breached. Nothing in this Code should be deemed to establish or augment any substantive legal duty on the part of mediators.

**Rule I. Scope**

This procedure applies to complaints against any individual mediator or mediation organization, including mediators listed on the statewide mediation roster pursuant to NDRC 8.9.

***Advisory Comment***

*A mediator is subject to this complaint procedure when providing any mediation services. The complaint procedure applies whether the services are court ordered or not, and whether the services are or are not pursuant to North Dakota Rules of Court. The ADR Review Board will consider the full context of the alleged misconduct, including whether the mediator was subject to other applicable codes of ethics, or was representing a mediation organization at the time of the alleged misconduct.*

**Rule II. Board**

The composition of the ADR Review Board will consist of three (3) experienced mediators as appointed by the Chief Justice of the ND Supreme Court after consultation with the President of the North Dakota Bar Association. At least one member appointed must be a non-lawyer mediator. Each member will serve for a term not to exceed three years; however, at the time of the creation of the ADR Review Board one member will serve one year before being eligible for reappointment, one member will serve two years



before being eligible for reappointment and one member will serve three years before being eligible for reappointment. No member may serve more than two consecutive three year terms. The Chief Justice shall designate a Chair of the ADR Review Board.

### **Rule III. Procedure**

**A.** A complaint must be in writing, signed by the complainant, and mailed or delivered to the ADR Review Board. The complaint shall identify the mediator and make a short and plain statement of the conduct forming the basis of the complaint.

**B.** The Board shall review the complaint to determine whether the allegations(s), if true, constitute a violation of the Code of Ethics.

**C.** If the allegations(s) of the complaint do not constitute a violation of the Code of Ethics, the complaint shall be dismissed and the complainant and the mediator shall be notified in writing.

**D.** If the Board concludes that the allegations of the complaint, if true, constitute a violation of the Code of Ethics, the Board will undertake such review, investigation, and action it deems appropriate. In all such cases, the Board shall send to the mediator, by certified mail, a copy of the complaint, a list identifying the ethical rules which may have been violated, and a request for a written response to the allegations and to any specific questions posed by the Board. It shall not be considered a violation of the Code of Ethics for the mediator to disclose notes, records, or recollections of the mediation process complained of as part of the complaint procedure. Confidentiality will be upheld by the Board and only the records and notes relevant to the complaint will be considered in order to protect the parties and the integrity of the mediation process. Except for good cause shown, if the mediator fails to respond to the complaint in writing within thirty (30) days, the allegations(s) shall be deemed admitted.

**E.** The Board, at its discretion, may refer the complainant and mediator to mediation conducted by a neutral and qualified mediator to resolve the issues raised by the complainant. Mediation shall proceed only if both the complainant and mediator consent. If the complaint is resolved through mediation, the Board shall dismiss the complaint, unless the resolution includes sanctions to be imposed by the Board. If no agreement is reached in mediation, the Board shall determine whether to proceed further.

**F.** After review and investigation, the Board shall advise the complainant and mediator of the Board's action in writing by certified mail sent to their respective last known addresses. Upon request within fourteen (14) days from receipt of the Board's action on the complaint, the mediator and the complainant shall be entitled to a hearing before the Board to contest proposed sanctions or findings, and have the right to bring or defend against all charges, to be represented by an attorney, and to examine and cross-examine witnesses. The Board shall receive evidence that the Board deems

necessary to understand and determine the dispute. Relevancy shall be liberally construed in favor of admission. The Board shall make an electronic recording of the proceedings. The Board at its own initiative, or by request of the complainant or mediator, may issue subpoenas for the attendance of witnesses and the production of documents and other evidentiary matter. The Board's decision is final.

#### **Rule IV. Sanctions**

- A. The Board may impose sanctions, including but not limited to:
  - (1) Issue a private reprimand.
  - (2) Designate the corrective action necessary for the mediator to remain on the statewide roster.
  - (3) Notify the appointing court and any professional licensing authority with which the mediator is affiliated of the complaint and its disposition.
  - (4) Publish the mediator's name, a summary of the violation, and any sanctions imposed.
  - (5) Remove the mediator from the roster of qualified mediators and set conditions for reinstatement.
- B. Sanctions shall only be imposed if supported by clear and convincing evidence. Conduct considered in previous or concurrent ethical complaints against the mediator is admissible to show a pattern of related conduct, the cumulative effect of which constitutes an ethical violation, and in consideration of appropriate sanctions.

#### **Rule V. Confidentiality**

- A. Unless and until sanctions are imposed, all files, records, and proceedings of the Board that relate to or arise out of any complaint shall be confidential, except:
  - (1) As between Board members and staff;
  - (2) Upon request of the mediator, the file maintained by the Board, excluding its work product, shall be provided to the mediator;
  - (3) As otherwise required or permitted by rule or statute; and
  - (4) To the extent that the mediator and complainant both waive confidentiality.

- B. If sanctions are imposed against any mediator pursuant to Section III A (2)-(5), the sanction shall be of public record, and the Board file shall remain confidential.
- C. Nothing in this rule shall be construed to require the disclosure of the mental processes or communications of the Board or staff.

**Rule VI. Privilege; Immunity**

- A. **Privilege.** A statement made in these proceedings is absolutely privileged and may not serve as a basis for liability in any civil lawsuit brought against the person who made the statement.
- B. **Immunity.** Board members and staff shall be immune from suit for any conduct in the course of their official duties.