



# **New York State Dispute Resolution Association, Inc.**

## **NYSDRA Mediator Standards of Practice**

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### Introduction

Founded in 1985, The New York State Dispute Resolution Association, Inc. (NYSDRA) is a non-profit membership organization committed to the use and promotion of peaceful dispute resolution. Representing the 27 Community Dispute Resolution Centers serving 62 counties in New York State and over 340 individual dispute resolution practitioners, NYSDRA is the state leader in the growing field of alternative dispute resolution.

As contract host agency, NYSDRA provides mediation and arbitration services for governmental clients, including the Office of the Attorney General (Lemon Law Arbitration), the NYS Health Department (Early Intervention Mediation), the Division of Housing & Community Renewal (Manufactured Housing Mediation), the NYS Education Department (Special Education Mediation.), the NYS Department of Labor (NYSDOL Mediation Program) and the Unified Court System State ADR Office, United States Department of Agriculture (NYS Agricultural Mediation Program), and Hon. Howard A. Levine, Whiteman Osterman and Hanna (Independent Mediation Assistance Program for victims of clergy sexual abuse).

In addition, NYSDRA provides advanced training in alternative dispute resolution, public and legislative education regarding the field of dispute resolution and serves as a member referral network.

The NYSDRA Mediator Standards of Practice (Standards) are being promulgated to serve as a practical guide for mediators, to provide information to the general public, and to further the professional development of quality mediation services in New York State.

The Standards are intended to be an evolving compendium that will expand as the practice of mediation develops in New York State, and as certification becomes available for advanced and specialized mediation practice. These Standards were drafted in conjunction with a certification process for those who wish to perform facilitative mediation within a general practice framework. NYSDRA anticipates developing certification criteria for the transformative approach to mediation and other advanced practice areas (e.g.; family, divorce, employment, commercial) in the future.

The NYSDRA Board of Directors will supplement and amend the Standards, as needed, so that they will continue to reflect the change and growth of professional development of alternative dispute resolution in New York State. A grievance process will be developed, and published decisions and advisory opinions will be incorporated into the body of the Standards.



**Mediator Standards of Practice**

**PREAMBLE**

- A. The Standards are intended to guide the conduct of mediators in New York State and to provide a framework for ethical decision making, and
- B. To educate participants in mediation, as well as the general public, about appropriate mediator conduct; and
- C. To instill and promote public confidence in mediation as a process for managing conflict, and to build trust in the integrity and competence of mediators in New York State.

**STANDARDS OF PRACTICE**

The Standards are aspirational in character. They describe good practices for mediators and are not intended to create legal rules or standards of legal liability. The Standards include different levels of guidance:

- 1. Use of the term “may” indicates the lowest strength of guidance and suggests a practice that the mediator should consider adopting but which can be deviated from in the exercise of good professional judgment;
- 2. Use of the term “should” indicates that the practice described in the Standard is highly desirable and should be departed from only with very strong reason;
- 3. Use of the term “shall” indicates the highest level of guidance to the mediator, indicating that the mediator should not have discretion to depart from the practice described.



## Mediator Standards of Practice

### I. The Mediation Process

#### A. Definition of Facilitative Mediation

Facilitative mediation is a process chosen by disputing parties, in which an (one or more) impartial third party provides an opportunity for constructive deliberation, problem solving, and decision making by the parties. Based on the principles of self-determination, fairness and privacy, the mediator facilitates communication in a way that makes it possible for each party to gain greater clarity of perspectives, preferences, issues, goals, and options; from which the parties can find and implement mutually acceptable terms of resolution.

#### B. Overview of the Mediation Process

1. Mediation involves one or more meetings or conversations between participants and their mediator(s) for the purpose of exchanging information and opinions, clarifying issues, exploring options, and, if the parties wish, resolving the matters in dispute. Mediators may also have separate, confidential meetings (caucus) with each of the participants. If agreements or resolutions are reached at the conclusion of the mediation, they may be in oral or written form.
2. Each of the participants should be informed about the benefits of mediation and alternative processes of dispute resolution. Dispute resolution processes should be delineated from counseling, arbitration or legal advocacy. This may be done in a telephone conversation or in person. A mediator shall be limited to the role of a mediator, and shall not give legal or other professional advice at any time.
3. A mediator shall disclose any conflict of interest and withdraw from the mediation if the mediator's neutrality is compromised. If a participant expresses the perception that the mediator's neutrality is compromised, then the mediator should address the perception and continue only if all the participants agree. Participants should be encouraged to share any knowledge of conflict of interest with a designated mediator, and be encouraged to request an impartial mediator.
4. A mediator shall explain the procedures and rules of the mediation process and make reasonable efforts to ensure that each party understands the mediation process. This understanding may be included in written form.
5. To ensure the quality of the mediation process a mediator should maintain an atmosphere of respect, fairness, and privacy, and to make reasonable efforts to ensure a balanced discussion.
6. A mediator shall discuss the process for formalizing and implementing an agreement.
7. The mediation process should conclude with a voluntary evaluation form to be completed by participants.

#### C. Full Disclosure

1. Before accepting a mediation, a mediator shall make reasonable inquiry to determine whether there are any known facts likely to affect the impartiality of the mediator.
2. A mediator shall disclose, as soon as she or he becomes aware of, any current, past or possible future representation or consulting relationship with any party or attorney involved in the mediation. Disclosure should also be made of any known or potential conflicts of interest. After such



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disclosure, the mediator may accept the mediation if all participants agree.

3. A mediator shall encourage the participants to act in good faith and to make full disclosure of all matters material to any agreement reached.
4. A mediator shall disclose and explain to the participants the fees, compensation or charges that may be incurred.
5. A mediator should inform the parties that they may be represented by legal counsel throughout the mediation process and that they are individually responsible for retaining counsel as they determine necessary.
6. Although the mediation process is generally considered confidential, a mediator shall inform the parties of any known parameters of confidentiality to the mediation process whether statutory, contractual or otherwise.
7. When requested by a participant, a mediator shall disclose information about his or her professional qualifications.

### D. Suspension or Termination

1. A mediator shall withdraw as mediator or suspend the mediation, as appropriate, when:
  - a. it becomes apparent that one or more of the participants is not participating in good faith or is abusing the mediation process, and the participant's bad faith, dishonesty or non-disclosure is so significant that the integrity of mediation cannot be maintained; or
  - b. one party has substantially more resources and/or bargaining power and the other party does not seem to fully comprehend the process, issues, or options, or is acting under fear or coercion; or
  - c. the mediator believes that a participant is unable or unwilling to participate effectively in the mediation process; or
  - d. it reasonably appears that the mediation is being used to further illegal activity.
2. If a mediator withdraws from or suspends the mediation under any of the circumstances above, the mediator should do so in a manner that does not violate the obligation of confidentiality, and the mediator should encourage the participants to seek appropriate professional help.
3. If the mediator continues the mediation under any of these circumstances, the mediator is not obliged to reveal the conduct to the other participant(s), and should not do so if this would violate the obligation of confidentiality.

### E. Opportunity for Full Expression

1. A mediator should provide all parties with a balanced opportunity for full expression of their needs, interests, issues, perceptions, common grounds and options for mutually acceptable resolutions.
2. In furtherance of this obligation, mediators shall become educated in areas relating to domestic violence and abuse protocols, including screening mechanisms and procedures for appropriately responding to situations involving these areas.



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### F. Self Determination

1. Self-determination in mediation may be defined as the participants' fundamental right to choose for themselves their path to resolve or not resolve their own dispute. A mediator shall respect this right and act in ways to encourage parties that they are free to decide for themselves without outside compulsion.
2. A mediator should be mindful of the role as a facilitator, and should not act in any way that will compromise the parties' rights to self-determination.

### G. Need for Independent Advice and Representation

1. A mediator shall advise the participants that the mediator can not represent any of the participants and can not provide any legal or professional advice or opinion, whether in response to statements or questions by the parties or otherwise.
2. The mediator should advise the participants that they may be represented by legal counsel or other professional assistance throughout the process.

### H. Agreements

1. While the mediation process need not culminate in an agreement, the mediator may assist the participants in refining options and reaching a consensual agreement resolving some or all of the issues outstanding in the dispute. The mediator should explore all options available to the participants, including options other than a formal agreement, as well as the respective opportunities for verbal and written agreements.
2. If the participants are able to reach a full or partial voluntary agreement, the mediator should assist in the creation of a written document or memorandum reflecting such agreement. The mediator, when appropriate, should discuss with the participants the processes for completing formalizing and implementing the agreement.
3. When appropriate, the mediator should assist the participants in drafting a clear and comprehensive written agreement.
4. When the participants reach a partial agreement, whether written or oral, the mediator may discuss the procedures available to resolve the remaining issues, including, without limitation, continued mediation, other appropriate dispute resolution processes, and quasi-judicial or judicial proceeding.

### I. Responsibility to the Participants

1. A mediator shall not conduct a mediation without obtaining informed consent from all participants.
2. In addition to the information discussed elsewhere in the Standards, a mediator should provide sufficient information to allow the participants to make meaningful decisions about whether to participate in mediation.



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3. A mediator should structure the sessions in a way that will allow participants to make decisions about the dispute based on as much information as possible.
4. A mediator should inform the participants that they have the right to legal counsel or other advocates to be present at the mediation. Others may participate in the process as agreed upon by all participants and the mediator.
5. A mediator shall inform the participants that any party or the mediator can withdraw from the process at any time.

### J. Impartiality

1. The mediator should maintain impartiality toward all parties. Impartiality means freedom from favoritism or bias either by word or by action or the appearance of such.
2. Impartiality includes a commitment to serve all participants rather than a single party.

### K. Confidentiality

1. A mediator shall maintain the confidentiality of all information obtained during the mediation, including any records made regarding the mediation, absent law to the contrary or by agreement of the participants.
2. A mediator shall provide information about relevant NYS law, contractual agreements, and any other relevant guidelines regarding confidentiality.
3. A mediator shall provide information about relevant NYS law and any other relevant guidelines defining exceptions to confidentiality, including, for example, child abuse, or threats to the safety of others.
4. A mediator should explain the use of caucus, or separate and private sessions held during a mediation, and explain the confidentiality of information arising in caucus.
5. A mediator should protect the confidentiality of the process and privacy of the participants in any subsequent discussions, including debriefing, research, evaluation, instruction, etc.

### L. Fees

1. A mediator shall fully disclose and explain the basis of compensation, fees and charges to the parties.
2. A mediator should endeavor to keep total charges for services and expenses reasonable and consistent with the nature of the case.
3. When asked, a mediator shall provide a written explanation of the fees and related costs, including time and manner of payment. Where applicable, the explanation should include the basis for and amount of charges for mediation, preparation, travel time, postponement or cancellation of sessions by the participants, the circumstances under which such charges will normally be assessed or



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waived, preparation of the agreement, and all other items to be billed by the mediator.

4. Upon termination of mediation a mediator should return any unearned fee to the participants.
5. A mediator shall not enter into a fee agreement which is contingent upon the results of the mediation or the amount of the settlement.

### M. Continuing Education

1. A mediator should determine what qualifications are required before mediating; if at any time it is apparent that additional skills, information, experience, or other areas of competence are needed, then a mediator has the obligation to disclose that information to the participants.
2. A mediator should regularly seek additional training and information, as well as objective evaluation of skills and competency.
3. A mediator should pursue continuing education regarding ethical and legal guidance, including confidentiality, professional development, and domestic violence.

### N. Advertising

1. A mediator shall maintain consistently high standards in advertising, promoting and publicly describing programs, services and credentials. Descriptive and promotional materials should be accurate and truthful, and should be expressed in clear and straight-forward language. There should be no promises, guarantees or claims concerning specific mediation outcomes or results.
2. Advertising and promotional materials may typically address the following:
  - a. the provider's credentials, including education experience, certification and other formal qualifications,
  - b. the mediation services and specialties offered, and
  - c. associated costs and potential benefits.

### O. Mediation as a Profession

1. A mediator should foster the development of mediation as a distinct profession, and to promote its integration into the community. Following are examples of tasks and activities commonly associated with these goals:
  - a. pro bono or reduced fee services for persons of limited economic means,
  - b. mentorship and training of prospective mediators,
  - c. public speaking and other community educational efforts,
  - d. research and evaluation of existing mediation resources and programs,
  - e. on-going professional training and education, and
  - f. peer mediation training for children and youth, as a basis for conflict resolution in elementary and secondary schools.



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### P. Accessibility

1. Mediators have a professional responsibility, commensurate with the nature of their practice and the resources available, to make mediation accessible to those who would like to use it.
2. Accordingly, a mediator should:
  - a. provide some mediation services in the community for no fee or at an appropriately reduced rate of compensation;
  - b. take reasonable measures to make mediation services and facilities accessible to all persons, including without limitation persons with disabilities and persons of diversity; and
  - c. ensure that judges and/or others who seek to refer matters to mediation may do so with confidence that those who perform mediation services do so consistent with accepted ethical rules and procedural guidelines.

### Q. Relationship with Mediators

1. Co-mediation: In situations where there are two or more mediators participating in a case, co-mediators should keep one another informed of developments essential to a cooperative effort and model professional behavior at all times.
2. Co-mediators should prepare for mediation in advance, and agree to share constructive criticism following their mediation.

### R. Relationship with Other Persons

1. A mediator should respect the relationship between mediation and legal, mental health, medical, social service and other professional services, and should promote cooperation with other professionals.
2. A mediator should facilitate consideration of the interests of persons affected by actual or potential agreements and who are not represented at the bargaining table.



## **II. COMPLAINT AND GRIEVANCE PROCEDURE**

### **A. Initiation of Complaints**

1. **Filing:** Any person participating in or affected by the mediation process may file with NYSDRA, together with the applicable fee, a complaint alleging a breach of these Ethics and Standards by a NYSDRA certified mediator.
2. **Form:** All complaints shall be reduced to writing on a form approved by the NYSDRA Board of Directors ("Board").
3. **Time:** A complaint shall be considered untimely and subject to denial unless it is filed within six months of the aggrieved act or occurrence, or the date on which such act or occurrence should reasonably have been discovered. This requirement may be waived in the Executive Director's discretion, for good cause shown.
4. **Notification:** Upon filing of a complaint in proper form and the applicable fee, the affected mediator shall be promptly notified and supplied with a copy thereof.

### **B. Preliminary Inquiry and Resolution**

1. The Executive Director or designated liaison shall initially seek to resolve the issues raised by a complaint through contacts with the complainant and the mediator. These efforts shall include the provision of information regarding mediation and other alternative dispute resolution processes.
2. In the event the Executive Director or designated liaison is unable to resolve a complaint in a manner acceptable to all participants within sixty days from the date of filing, the Executive Director or designated liaison shall refer the matter to the Complaint Committee by forwarding a copy of the complaint and the written results of the preliminary efforts to the Chairperson thereof.

### **C. Complaint Committee**

1. The Complaint Committee shall be comprised of three (3) members,
  - a. one of which shall be a member of the Board;
  - b. one of which shall be a member of the NYSDRA Ethics and Standards Committee who is not a member of the Board; and
  - c. one of which will be a general NYSDRA member, who is neither a member of the Board nor a member of the NYSDRA Ethics and Standards Committee.
2. **Facial Sufficiency Determination:** Within thirty days of the date of receipt, the Complaint Committee shall conduct an initial review to determine whether, in the Committee's opinion, the complaint states a facially sufficient ground under the Standards and Ethics Guidelines. For purposes of this section, the term "facially sufficient" means that the complaint describes conduct or circumstances which, if true, would constitute a breach of these Standards and Ethics.
3. If the Complaint Committee determines the complaint to be facially insufficient, the complaint shall be dismissed. The complainant, the mediator and the Executive Director or designated liaison shall be promptly notified in writing of the dismissal and the reason therefore.



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4. If the Complaint Committee determines the complaint to be facially sufficient, the Complaint Committee shall promptly notify the complainant, the mediator and the Executive Director or designated liaison in writing. This notification shall, among other things deemed necessary by the Committee:
  - a. Notify the mediator that he or she must file a response to the complaint in writing within 30 days of the date of the notification, and also serve a copy of said response upon the complainant, by certified mail, return receipt requested, within the same time frame; and
  - b. Notify the mediator and the complainant of a hearing date, to be held not less than 45 days and not more than 90 days from the date of the notification.

### D. Hearing

1. Any party may be represented by counsel during the hearing process.
2. The hearing shall be conducted informally but with decorum. At the hearing the complainant and the mediator may present their respective positions to the Committee either orally, in writing, or by any combination thereof.
3. The complainant shall present his or her position first, after which the mediator shall have an opportunity to respond. The Complaint Committee shall take such other and further presentations, testimony or evidence as deemed appropriate under the circumstances.
4. There shall be no formal transcription of the hearing process required, other than regularly-kept minutes of the Committee meeting. However, a recording of the hearing will be made either through tape, digital or other accurate recording method. This recording shall be maintained for a period of one (1) year from the date of the hearing.
5. The formal rules of evidence and procedure applicable to civil actions or proceedings shall not apply.

### E. Complaint Committee Determination

1. The Complaint Committee may impose one or more of the following sanctions:
  - a. Oral admonishment;
  - b. Written admonishment or reprimand;
  - c. Reasonable conditions upon continued NYSDRA certification, including without limitation the mediator's agreement to:
    - i. Receive additional training, which may include observations of mediations; and
    - ii. Restrict the types of matters which she or he will mediate in the future.
2. **Decertification:** If the Complaint Committee concludes that decertification is the appropriate remedy it may, in its written determination, include provisions for recertification of the sanctioned mediator, consistent with the NYSDRA Certification Standards.

**F. Refund of fee:** The Complaint Committee may, in its discretion, direct a refund of the filing fee.

**G. Notification:** The Complaint Committee, within 5 days of its determination, shall in writing notify the complainant, the mediator and the Executive Director or designated liaison of its determination.

**H. Finality of Determination:** The Complaint Committee's determination, absent further action by the Board as



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set forth below, shall be final.

### **I. Board Involvement**

1. Each determination set forth above shall be reported to the Board at the next regularly-scheduled meeting thereof;
2. The Board shall have wide latitude to implement the above complaint and grievance procedures, and to take any further action, on such terms as deemed reasonably prudent.
3. A complainant or mediator who objects to any determination of the Complaint Committee may request to be placed on the agenda of a regularly-scheduled or special Board meeting for the purpose of presenting his or her objection to the Board. Any further action with respect to this determination shall be at the sole discretion of the Board.