

ARKANSAS REGISTER

Transmittal Sheet



Sharon Priest
Secretary of State
State Capitol Room 026
Little Rock, Arkansas 72201-1094

For Office

Use Only:

Effective Date _____

Code Number _____

Name of Agency Arkansas Alternative Dispute Resolution Commission

Department _____

Contact Jennifer Jones Taylor

Phone 501-682-9400

Statutory Authority for Promulgating Rules Ark. Code Ann. 16-7-104 (3) (A)

Intended Effective Date		Date
<input type="checkbox"/> Emergency	Legal Notice Published.....	<u>03/03/2001</u>
<input type="checkbox"/> 10 Days After Filing	Final Date for Public Comment.....	<u>04/09/2001</u>
<input type="checkbox"/> Other	Reviewed by Legislative Council.....	<u>07/05/2001</u>
_____	Adopted by State Agency.....	<u>04/13/2001</u>

CERTIFICATION OF AUTHORIZED OFFICER

I Hereby Certify That The Attached Rules Were Adopted
In Compliance with Act 434 of 1967 As Amended.

Jennifer Jones Taylor
Signature

501-682-9400

Phone Number

Coordinator, ADR Commission

Title

July 7, 2001
Date

FILED

JUL 09 2001

SHARON PRIEST
SECRETARY OF STATE

QUESTIONNAIRE FOR FILING PROPOSED RULES AND REGULATIONS
WITH THE ARKANSAS LEGISLATIVE COUNCIL AND JOINT INTERIM COMMITTEE

DEPARTMENT/AGENCY Administrative Office of the Courts
DIVISION Arkansas Alternative Dispute Resolution
Commission
DIVISION DIRECTOR Jennifer Jones Taylor
CONTACT PERSON Jennifer Jones Taylor
ADDRESS 625 Marshall Street, Little Rock, AR 72201
PHONE NO. (501)682-9400 FAX NO. (501)682-9410

INSTRUCTIONS

- A. Please make copies of this form for future use.
- B. Please answer each question completely using layman terms.
- C. If you have a method of indexing your rules, please give the proposed citation after "Short Title of this Rule" below.
- D. Submit two (2) copies of this questionnaire attached to the front of two (2) copies of your proposed rule and mail or deliver to:

Donna K. Davis
Subcommittee on Administrative Rules and Regulations
Arkansas Legislative Council
Bureau of Legislative Research
Room 315, State Capitol
Little Rock, AR 72201

- 1. What is the short title of this rule?
Requirements for the Conduct of Mediations and Mediators
- 2. What is the subject of the proposed rule?
Rules of conduct to which mediators on the Arkansas
Alternative Dispute Resolution Commission's Roster of
Mediators must adhere.
- 3. Is this rule required to comply with federal statute or
regulations? Yes No
- 4. Was this rule filed under the emergency provisions of the
Administrative Procedures Act? Yes No

If yes, what is the effective date of the emergency rule?

When does the emergency rule expire?

Will this emergency rule be promulgated under the regular provisions of the Administrative Procedure Act?

Yes _____ No _____

5. Is this a new rule? Yes X No _____
6. Cite the state law granting the authority for this proposed rule. If codified, please give Arkansas Code citation.

Ark. Code Ann. § 16-7-104 (3) (A)

7. What is the purpose of this proposed rule? Why is it necessary?
The purpose of the rule is to set forth requirements for the conduct of mediators on the ADR Commission's Roster of Mediators. Pursuant to Ark. Code Ann. § 16-7-201, the Commission has the authority and responsibility to establish standards and regulations for the professional conduct of persons who shall be eligible to serve as compensated mediators in and for state and local courts.

8. Will a public hearing be held on this proposed rule?
Yes ___ No X If yes, please give the date, time, and place of the public hearing.

9. When does the public comment period expire?
April 9, 2001 at 5:00 p.m.

10. What is the proposed effective date of this proposed rule?
June 8, 2001

11. Do you expect this rule to be controversial? Yes ___ No X

12. Please give the names of persons, groups, or organizations that you expect to comment on these rules. Please provide their position (for or against) if known.
None.

DEPARTMENT Administrative Office of the Courts
 DIVISION Arkansas Alternative Dispute Resolution Commission
 PERSON COMPLETING THIS STATEMENT Jennifer Jones Taylor
 TELEPHONE NO. (501)682-9400 FAX NO. (501)682-9410

FINANCIAL IMPACT STATEMENT

To comply with Act 1104 of 1995, please complete the following Financial Impact Statement and file with the questionnaire and proposed rules.

SHORT TITLE OF THIS RULE Requirements for the Conduct of Mediation and Mediators

1. Does this proposed, amended, or repealed rule or regulation have a financial impact? Yes _____ No X
2. If you believe that the development of a financial impact statement is so speculative as to be cost prohibited, please explain.
3. If the purpose of this rule or regulation is to implement a federal rule or regulation, please give the incremental cost for implementing the regulation.

<u>Current Fiscal Year</u>	<u>Next Fiscal Year</u>
General Revenue _____	General Revenue _____
Federal Funds _____	Federal Funds _____
Cash Funds _____	Cash Funds _____
Special Revenue _____	Special Revenue _____
Other _____	Other _____
Total _____	Total _____

4. What is the total estimated cost by fiscal year to any party subject to the proposed, amended, or repealed rule or regulation?

<u>Current Fiscal Year</u>	<u>Next Fiscal Year</u>
\$0	\$0

5. What is the total estimated cost by fiscal year to the agency to implement this regulation?

<u>Current Fiscal Year</u>	<u>Next Fiscal Year</u>
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**ARKANSAS ALTERNATIVE DISPUTE RESOLUTION COMMISSION
REQUIREMENTS
FOR THE CONDUCT OF MEDIATION AND MEDIATORS**

The Requirements for the Conduct of Mediation and Mediators have three primary goals: 1) serve as a guide for the conduct of mediators; 2) inform the mediating parties; and 3) instill public confidence in the mediation process. These requirements are drawn from existing codes of conduct for mediators and address issues and problems which have surfaced in mediation practice.

I. INTRODUCTION

These requirements serve as the foundation for the conduct of mediators practicing in the state of Arkansas. They set out standards of behavior for mediators in relationship to the parties in dispute, fellow mediators, and the citizens of Arkansas.

These requirements are not a comprehensive list of the ethical considerations which should guide the conduct of a mediator. However, they are framework for the ethical practice of mediation.

Nothing in these requirements should be interpreted to establish or augment any substantive legal duty on the part of mediators. Violation of a Standard shall not give rise to a cause of action nor shall it create any presumption that a legal duty has been breached. However, violation of *The Requirements for the Conduct of Mediation and Mediators* may result in disqualification from the Commission's Roster of Mediators.

II SCOPE, DEFINITION, MEDIATOR'S ROLE, GENERAL PRINCIPLES, AND EFFECTIVE DATE

A. Scope. The Requirements set out in this document shall apply to all mediators included on the Arkansas Alternative Dispute Resolution Commission's Roster of Mediators. The Commission recommends that all mediators practicing in the state of Arkansas adhere to these requirements.

B. Definition of Mediation. Mediation is a dispute settlement process in which a neutral third party assists disputing parties in reaching a mutually acceptable agreement. The mediator may suggest alternatives, but does not create an agreement for, or impose an agreement on, the parties. Mediation is a non-adversarial process in which the objective is the encouragement and facilitation of a mutually acceptable agreement based on the parties self-determined needs, interests, and values.

C. Mediator's Role. In mediation, decision-making authority rests with the disputing parties. The role of the mediator includes, but is not limited to, assisting the disputing parties in identifying issues, facilitating communication, focusing the disputing parties on their interests maximizing the exploration of alternatives, and helping the disputing parties reach voluntary agreements. The mediator may offer options for the parties to consider as settlement terms, but is not to judge or impose settlement terms on the parties.

D. General Principles. Mediation is based on principles of communication, negotiation, facilitation, and the technique or method of solving problems. It emphasizes:

- (1.) The needs and interests of the disputing parties;
- (2.) Fairness and the merits of the issues as defined by the parties;
- (3.) Procedural flexibility;
- (4.) Privacy and confidentiality;
- (5.) Full disclosure; and
- (6.) Self-determination.

E. Effective Date. April 13, 2001.

III. STANDARDS

STANDARD 1. GENERAL

A. Integrity, Impartiality, and Professional Competence. Integrity, impartiality, and professional competence are the essential qualifications of any mediator. Professional competence means the knowledge, skill, and thoroughness reasonably necessary for the practice of mediation.

(1.) A mediator shall not accept any engagement, perform any service, or undertake any act that would compromise the mediator's integrity.

(2.) A mediator shall maintain professional competence in mediation skill. This includes, but is not limited to:

- (a.) Staying informed of, and abiding by, all statutes, rules, and administrative orders relevant to the practice of mediation; and
- (b.) Engaging in educational activities promoting professional growth.

(3.) If the mediator decides that a case is beyond the mediator's competence, the mediator shall decline appointment, withdraw, or request technical assistance.

(4.) A mediator shall be courteous toward a co-mediator and avoid any appearance of conflict with or criticism of a co-mediator in the presence of parties in mediation.

(5.) A mediator shall respect and promote cooperation and understanding among all parties involved in mediation, including , but not limited to, disputants, mediators, attorneys, judges, mental health and social service professionals.

(6.) A mediator shall not practice, condone, or facilitate any form of discrimination against any party on the basis of any characteristic, condition, preference, belief, or status of such party.

B. Concurrent Standards. Nothing contained herein shall replace, eliminate, or render inapplicable relevant ethical standards not in conflict with these rules that may be imposed upon any mediator by virtue of the mediator's profession.

STANDARD 2. RESPONSIBILITIES TO COURTS

A mediator shall be candid, accurate, and fully responsive to a court concerning the mediator's qualifications, availability, and other matters pertinent to his or her being selected to mediate. A mediator shall observe all administrative policies, procedural rules, and statutes that apply to mediation. A mediator shall refrain from any activity that has the appearance of improperly influencing a court to secure placement on a roster of mediators or appointment to a case.

STANDARD 3. THE MEDIATION PROCESS

A. Orientation Session. In order for parties to exercise self-determination they must understand the mediation process. At the beginning of the mediation session, the mediator should explain the mediation process. This explanation should include:

(1.) the role of the mediator is as a neutral party who will assist and encourage the parties to make informed and voluntary decisions that can lead to settlement. The mediator is not an authority of fact or law in the session. All settlement decisions are to be made by the parties, not the mediator.

(2.) the role of the mediator can include, but is not limited to:

- (a.) assisting the parties by facilitating communication;
- (b.) encouraging engagement and autonomy in the process;
- (c.) clarifying and reality testing issues;

- (d.) reducing obstacles to decision making;
- (e.) encouraging parties to evaluate options;
- (f.) encouraging an informed and voluntary agreement;

(3.) the procedure that will be followed during the mediation session or sessions;

(4.) the pledge of confidentiality that applies to the mediation process;

(5.) the fact that the mediator does not represent either party and will not give professional advice. If expert advice is needed, the parties will be expected to consult with experts other than the mediator; and

(6.) the fact that the mediator is responsible for promoting a reasonable negotiating atmosphere. A safe and neutral environment is expected and shall be controlled by the mediator to the point of stopping the mediation if maintaining safety is in jeopardy.

Further, in the event a party is not represented by an attorney, the mediator should explain:

(a.) that the parties are free to consult legal counsel at any time and are encouraged to have any settlement agreement resulting from the mediation process reviewed by counsel before they sign it; and

(b.) that a mediated agreement, once signed, is binding and can have a significant effect upon the rights of the parties and upon the status of the case.

B. Continuing Mediation. A mediator shall withdraw from a mediation if the mediator believes the mediation is being used to further illegal conduct. A mediator shall withdraw if the mediator believes any agreement reached would be the result of fraud, duress, overreaching, the absence of bargaining ability, or unconscionability. A mediator shall not prolong a mediation session if it becomes apparent that the case is unsuitable for mediation or if one or more of the parties is unable or unwilling to participate in the mediation process in a meaningful manner.

C. Avoidance of Delay. A mediator shall perform mediation services in a timely and expeditious fashion, avoiding delays whenever reasonably possible. A mediator shall refrain from accepting additional appointments when it becomes apparent that completion of mediation assignments already accepted cannot be accomplished in a timely fashion.

STANDARD 4. SELF-DETERMINATION

A. Parties' Right and Obligation to Decide. A mediator is to assist the parties in reaching an informed and voluntary agreement. Substantive decisions made during mediation are to be made voluntarily by the parties.

B. Prohibition of Coercion. A mediator shall not coerce or unfairly influence a party into entering into a settlement agreement.

C. Misrepresentation Prohibited. A mediator shall not intentionally misrepresent material facts or circumstances in the course of a mediation.

D. Balanced Process. A mediator shall encourage a reasonably balanced process and encourage the parties to participate in the mediation proceedings in a non-adversarial manner.

E. Responsibility to Nonparticipating Parties. A mediator may promote consideration of the interests of persons who may be affected by an agreement resulting from the mediation process and who are not represented in the mediation process.

STANDARD 5. IMPARTIALITY AND CONFLICTS OF INTEREST

A. Impartiality. A mediator is expected to be impartial and advise all parties of any circumstances that may result in possible bias, prejudice or impartiality on the part of the mediator. Impartiality means freedom from favoritism or bias in work, action, and appearance. Impartiality implies a commitment to aid all parties, as opposed to one or more specific parties, in moving toward an agreement.

(1.) a mediator shall maintain impartiality while raising questions for the parties to consider concerning the fairness, equity, and feasibility of proposed settlement options.

(2.) a mediator shall withdraw from mediation if the mediator believes he or she can no longer remain impartial.

B. Required Disclosures and Conflicts of Interest.

(1.) A mediator shall disclose to the disputing parties the following:

(a.) any current or past representation of, or consulting relationship with, any party or the attorney of any party involved in the mediation.

(b.) any monetary interest the mediator may have in common with any of the parties or that may be affected by the outcome of the mediation process.

(c.) known potential conflicts, including membership on a board of directors, full or part-time service as a representative or advocate, consultation work performed for a fee, arrangements, or any other form of managerial, financial, or immediate family interest with respect to a party involved. A mediator who is a member of a law firm is obligated to disclose any representation of any of the disputing parties by the mediator's firm or a member of that firm of which the mediator is aware.

(d.) any close personal relationship or other circumstances, in addition to those specifically mentioned in this Standard, that might reasonably raise a question as to the

mediator's impartiality.

(2.) Mediators establish personal relationships with many representatives, attorneys, other mediators, and members of various other professional associations. Mediators should not be secretive about such friendships or acquaintances, but disclosure of these relationships is not necessary unless the relationship is one of those mentioned in this Standard or some feature of a particular relationship which might reasonably appear to impair impartiality.

(3.) Prior service as a mediator in a mediation involving a party or an attorney for a party does not constitute representation of the party or consultation work for the party. However, mediators are strongly encouraged to disclose such prior relationships. Mediators are expected to disclose any ongoing relationship with a party or an attorney for a party involved in a mediation, including membership on a panel of persons providing mediation, arbitration, or other alternative dispute resolution services to that party or attorney.

(4.) A mediator shall not provide counseling, therapy, or give legal advice to any party during the mediation process

(5.) A mediator who is a lawyer shall not represent a party involved in the mediation or any case related to the mediation.

(6.) All disclosures required by this Standard shall be made as soon as practical after the mediator becomes aware of the interest or the relationship.

(7.) The burden of disclosure rests on the mediator and continues throughout the mediation process. After appropriate disclosure, the mediator may mediate the dispute if all parties to the mediation agree to the mediator's participation and that agreement is reduced to writing. If the mediator believes that the relationship or interest would affect the mediator's impartiality, he or she shall withdraw, irrespective of the expressed desires of the parties.

(8.) A mediator shall not use the mediation process to solicit any party to the mediation concerning future professional services.

(9.) A mediator shall avoid the appearance of a conflict of interest both during and after the mediation. Without the consent of all parties, a mediator shall not subsequently establish a professional relationship with one of the parties in the same or a substantially related matter.

STANDARD 6. CONFIDENTIALITY

A. Confidentiality. A mediator shall preserve and maintain the confidentiality of all mediation proceedings as permitted by state statute except where required by law to disclose information gathered during the mediation.

B. Records and Research Data. A mediator shall store and dispose of records relating to mediation proceedings in a confidential manner and shall ensure that all identifying information is removed and the anonymity of the parties is protected when materials included in those records are used for research, training, or statistical compilations.

STANDARD 7. PROFESSIONAL ADVICE

A. Generally. A mediator shall not provide information which he or she is not qualified by training or experience to provide.

B. Independent Legal Advice. When a mediator believes a party does not understand or appreciate how a potential agreement reached through the mediation process may adversely affect the party's legal rights or obligations, the mediator shall advise the participants to seek independent legal advice.

C. Participation of Parties. If any party to the mediation is unrepresented or unable to participate in the mediation process for psychological or physical reasons, a mediator shall postpone or cancel mediation until such time as all parties are able to participate.

D. Personal or Professional Opinion. A mediator may discuss possible outcomes of a dispute, but a mediator shall not offer a personal or professional opinion regarding the likelihood of any specific outcome.

STANDARD 8. FEES AND EXPENSES; PRO BONO SERVICE

A. General Requirements. A mediator occupies a position of trust with respect to the parties and the court system. In charging for services and expenses, the mediator shall be governed by the same high standards of honor and integrity that apply to all other phases of the mediator's work. A mediator shall be scrupulous and honest in billing and should avoid charging excessive fees and expenses for mediation services.

B. Records. A mediator shall maintain adequate records to support charges for services and expenses and shall make an accounting to the parties or to the court upon request.

C. Referrals. No commissions, rebates, or similar remuneration shall be given to or received by a mediator for referral of persons for mediation or related services.

D. Contingent Fees. A mediator shall not charge or accept a contingent fee or base a fee in any manner on the outcome of the mediation process.

E. Minimum Fees. A mediator may specify in advance minimum charges for scheduling or conducting a mediation session without violating this Standard.

F. Disclosure of Fees. When a mediator is contacted directly by the parties for mediation services, the mediator has a professional responsibility to respond to questions regarding fees by providing a copy of the basis for charges including all fees and expenses.

G. Pro Bono Service. Mediators are encouraged to meet the needs of those unable to pay for their services by offering their services pro bono or at a reduced rate of compensation whenever appropriate.

STANDARD 9. TRAINING AND EDUCATION

A. Training. A mediator is obligated to acquire knowledge and training in the performance of the mediation process, including an understanding of appropriate professional ethics, standards, and responsibilities. Upon request, a mediator shall disclose the extent and nature of the mediator's education, training, and experience to the parties, the parties' attorneys, the judge in the case or the Arkansas Alternative Dispute Resolution Commission.

B. Continuing Education. It is important that mediators continue their professional education as long as they are actively serving as mediators. A mediator shall be personally responsible for ongoing professional growth, including participation in such continuing education as may be required by law or rule of the Arkansas Alternative Dispute Resolution Commission or any other appropriate authority.

C. New Mediator Training. An experienced mediator should cooperate in the training of new mediators, including serving as a mentor.

STANDARD 10. ADVERTISING

Advertising or any other communication with the public concerning mediation services offered by the mediator or regarding the education, training, and expertise of the mediator shall be truthful. Mediators shall refrain from making promises and guarantees of results.

STANDARD 11. ADVANCEMENT OF MEDIATION

A mediator should support the advancement of mediation by encouraging and participating in research, evaluation, or other forms of professional development and public education.