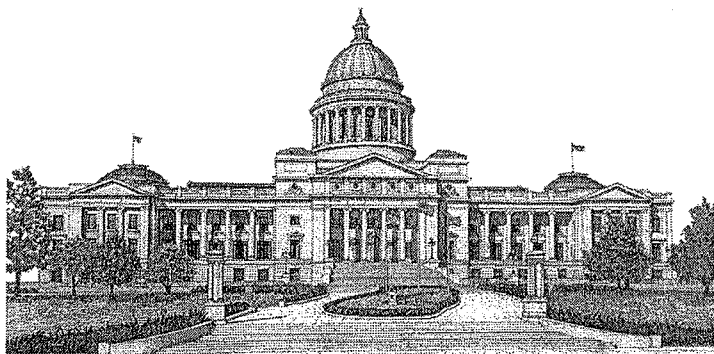


# ARKANSAS REGISTER

## Transmittal Sheet

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Secretary of State  
**Mark Martin**  
State Capitol, Suite 026  
Little Rock, Arkansas 72201-1094  
(501) 682-3527  
[www.sos.arkansas.gov](http://www.sos.arkansas.gov)



**For Office Use Only:**

Effective Date \_\_\_\_\_ Code Number \_\_\_\_\_

Name of Agency ARKANSAS ALTERNATIVE DISPUTE RESOLUTION COMMISSION

Department \_\_\_\_\_

Contact JENNIFER TAYLOR E-mail jennifer.taylor@arkansas.gov Phone 501-682-9400

Statutory Authority for Promulgating Rules Ark. Code Ann.16-7-104

**Rule Title:** Requirements of the Conduct of Mediation and Mediators

**Intended Effective Date**  
(Check One)

- Emergency (ACA 25-15-204)
- 30 Days After Filing (ACA 25-15-204)
- Other \_\_\_\_\_  
(Must be more than 30 days after filing date.)

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Electronic Copy of Rule submitted under ACA 25-15-218 by:

<u>JENNIFER TAYLOR</u>	<u>jennifer.taylor@arkansas.gov</u>	<u>December 18, 2012</u>
Contact Person	E-mail Address	Date

### CERTIFICATION OF AUTHORIZED OFFICER

I Hereby Certify That The Attached Rules Were Adopted  
In Compliance with Act 434 of 1967 the Arkansas Administrative Procedures Act. (ACA 25-15-201 et. seq.)

Jennifer Taylor  
Signature

(501) 682-9400  
Phone Number

jennifer.taylor@arkansas.gov  
E-mail Address

ADR Coordinator  
Title

12-19-12  
Date

**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

**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.

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 except in multi-party disputes in which the parties who are willing and able to participate may reach a resolution.

**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. Mandated Reporters.** A mediator who is a mandated reporter must disclose that status to all parties prior to the mediation and again during the mediator's opening statement at the mediation.

**C. 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 that is not otherwise publicly available is removed and the anonymity of the parties is protected when materials included in those records are used for research, training, or statistical compilations. Nothing in this prohibition shall prevent the mediator from providing information to any court or statistical research effort regarding court ordered mediations when such information is otherwise within the public domain.

## **STANDARD 7. MEDIATOR REPORTS**

**A. Prohibited Mediator Reports.** Except as permitted in section (B), a mediator shall not make a report, assessment, evaluation, recommendation, finding, or other communication regarding a mediation to a court, administrative agency, or other authority that may make a ruling on the dispute that is the subject of the mediation.

**B. Permitted Disclosures.** A mediator may disclose whether the mediation occurred or has terminated, whether a settlement was reached, and attendance.

## **STANDARD 8. 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 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 9. 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 10. 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 11. 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 12. 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.