

Dispute Resolution Section of the Idaho State Bar
Meeting and CLE October 16, 2013

Agenda

Roll call

Minutes – previous and approval

Financials - current and approval

Confirm new council members and thank you

Confirm Bylaw changes – discussion, motion, vote

Announce Focus Meeting November 15th at ISB (working lunch 11-2) need to rsvp

CLE on Mediation Ethics

Is Your Idea the Best Idea? Do the ethical rules provide flexibility to resolve disputes in the modern world?

Review of Idaho Rules of Conduct 1.12, 2.1, 2.2, 2.3, 4 in entirety, 5.5 unauthorized practice of law,

Review of IMA Rules to be provided

Review of Small Claims Court Mediation Rules – hyperlink below

Reminder of article by Maureen Laflin - *Dreamers and Visionaries* – hyperlink below

Reminder of Article by Britt Ide – *Upstream Mediation: How You Can Use Mediation Tools Before Litigation to Grow Your Practice* – Advocate May 2013

Other Articles three articles – hyperlinks below

Hypotheticals—Handout (also emailed to folks on conference call) and Small Group Discussion (copies to be handed out. (how would you handle, what issues have you seen, what questions do you have)

Discussion as a group



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Reference:

Rules and Standards

[Idaho Rules of Professional Conduct](#)

[Model Standards Of Conduct For Mediators](#)

[Standards Of Professional Conduct In Alternative Dispute Resolution](#)

[Ada County Small Claims Court Mediation Program Ethical Guidelines](#)

Articles

[The Mediation Ethics Coach: Fourteen Tips To Avoid Mediator Ethic's Violations, Or How To Stay Out Of Trouble](#) - Melvin A. Rubin November 2010

[Bush, Robert A. Baruch. *The Dilemmas Of Mediation Practice: A Study Of Ethical Dilemmas And Policy Implications.*](#)

[Ethics Of Mediation Evaluation: Some Troublesome Questions And Tentative Proposals, From An Evaluative Lawyer Mediator, The, Stark, James H.](#)

[Dreamers and Visionaries: The History of ADR in Idaho, Prof Maureen Laflin, University of Idaho](#)

Additional Material

[Florida Court Mediator Ethics Advisory Committee \(Meac\) Opinions Subject Matter And Chronological Advisory Opinion Index Summaries From 1994 - Present](#)

IDAHO MEDIATION ASSOCIATION STANDARDS OF PRACTICE FOR IDAHO MEDIATORS

Preamble

Mediation is a process by which a neutral third party facilitates the resolution of conflict between two or more parties. Mediators must be qualified and impartial. Decision making authority rests at all times with the parties. The parties should have clear and sufficient information so that they can make informed decisions. A mediator facilitates the clarification of interests and exploration of alternatives. The mediator does not make decisions for the parties. A mediator's role is to raise questions for consideration by the parties including questions of fairness and feasibility of settlement options. A mediator's function is distinct from the role of legal advisor, representative or therapist. The mediation process is distinct from processes involving arbitration, litigation, evaluation or recommendation. These standards are intended to assist and guide public, private, voluntary and mandatory mediation. It is understood that the manner of implementation and mediator adherence to these standards may be influenced by variations in local law, court rule, or standards of other professions. The Idaho Mediation Association views these standards as minimum standards that can reasonably be expected of mediators holding certificates issued by the Association. Mediators who are not Idaho Mediation Association certified are encouraged to abide by these standards when acting in a meditative capacity.

I. Facilitating the Process

1. Educating Parties About Mediation

A mediator has a duty to educate parties about the mediation process so that parties understand the differences between mediation, arbitration, and other forms of conflict resolution, as well as therapy, counseling, or legal representation.

2. Appropriateness of Mediation

A mediator has a duty to assess the parties' willingness and ability to mediate. A mediator will help the participants evaluate the benefits, risks and costs of mediation and the alternatives available to them. If mediation is inappropriate, the mediator must decline to mediate and suggest parties seek another conflict resolution process. This is a continuing and on-going duty of the mediator.

3. Responsibility to Absentee Parties

A mediator will make reasonable effort to assist the parties to consider the interests of absentee parties who are not being represented in the mediation process but will be affected by the subsequent outcome.

4. Identification of Issues

A mediator has a duty to gather information from the parties and assist them to mutually define and agree on issues to be addressed in the mediation.

5. Duty to Disclose

Prior to the mutual agreement to commence, the mediator must disclose to parties any biases or strong views relating to the issues to be mediated. This is a continuing and ongoing duty of the mediator. A mediator has a duty to assess his or her own ability and willingness to undertake mediation with the particular parties and the issues to be mediated. The mediator shall disclose experience, training and any allegiance to participating parties.

6. Disclosure by the Parties

A mediator will insist upon disclosure of relevant information in the mediation process. If the mediator believes the parties are not acting in good faith, he or she may suspend or terminate the process.

7. Procedures

A mediator should reach an understanding with the parties regarding the procedures to be followed in mediation. This includes, but is not limited to the use of joint or separate sessions, caucus, confidentiality, involvement of additional parties, legal services, and conditions under which mediation may be terminated. Through verbal or written mutual agreement, the mediator and parties must define the rules by which the mediation is conducted. The duties and responsibilities of each participant should be clear. The parties should understand that they (individually or collectively) or the mediator has the right to voluntarily suspend or terminate the process at any time.

8. Costs and Fees

A mediator has a duty to explain fees for payment of services. Mediation is not based on contingency fees or percentages of the outcome of the settlement. When setting fees, the mediator assures that they are explicit, fair, reasonable and commensurate with services to be performed. Any unearned fees will be promptly returned to participants. No commissions, rebates, or similar forms of remuneration are given or received for referral of clients for mediation services.

9. Independent Legal Counsel

Mediators should encourage parties to seek independent legal counsel during the process, if appropriate, and will inform the parties that mediation is not a substitute for legal counsel.

II. Confidentiality

1. Exchange of Information

A mediator has a duty to foster the confidentiality of the process unless all parties agree to share information under specific circumstances.

2. Duty to Report

In relevant cases, a mediator must inform the parties that he or she is compelled by law to report to appropriate authorities information about child abuse, neglect or abandonment. Mediators are strongly encouraged to report to the appropriate authorities threat of injury to self or others, unless required to do so by other professional standards.

3. Legal Testimony

A mediator will refrain from testifying at court proceedings without the consent of all parties. However, the mediator should explain to the parties that he or she may be compelled to testify as a result of judicial rule.

4. Storage and Disposal of Records

A mediator has a duty to store and dispose of records in a confidential and professional manner.

5. Release of Information

A mediator shall obtain mutual written consent of parties prior to release of information to others. When records concerning mediations are used for research or training purposes, the mediator will maintain participant confidentiality and render anonymous all identifying information.

III. Impartiality

1. Prior Relationships

A mediator will disclose to the participants any prior affiliations he or she may have with parties prior to the start of mediation. If prior services have been provided to any of the

participants, mediation will not proceed until the relationship has been discussed, the role of the mediator has been made distinct from the earlier relationship, and the participants voluntarily agree to proceed with mediation.

2. Post-Mediation Relationships

A mediator should be aware that post-mediation professional or social relationships may compromise the availability of the mediator as a neutral third party.

3. Independence of Mediator From Other Professional Roles

A mediator who is an attorney, mental health, or other professional shall not represent or counsel either party during or after the mediation process in matters pertaining to the instant mediation. The mediator should refer these issues to appropriate outside resources.

4. Conflict of Interest

The mediator will have no financial or other interest in the outcome of the mediation other than the agreed upon fee arrangement. A mediator must disclose any circumstance to the participants that might cause a conflict of interest.

5. Promotion of Understanding

The primary responsibility for the resolution of the dispute rests with the participants. The mediator has a duty to assist the participants in reaching an informed and voluntary settlement. At no time should a mediator coerce a party into agreement or make a substantive decision for any participant. The mediator will promote understanding and will assist the parties in disclosure of relevant information prior to reaching agreement. The mediator may recommend that parties obtain expert consultation when additional knowledge or understanding is necessary.

6. Providing Professional Advice

A mediator may provide information where qualified by training and experience. The mediator should only provide an interpretation or advice based upon the mediator's area(s) of expertise.

IV. Concluding Mediation

1. With Agreement

When participants reach mutual agreement, the mediator will discuss the process for formalizing and implementing the memorandum of understanding. When partial agreement is reached, the mediator will discuss the procedures available to resolve the remaining issues.

2. Without Agreement

If the mediator determines that the parties are unable or unwilling to participate in meaningful discussion or if they reach impasse the mediator should terminate the process. If the process is terminated the mediator may assist the parties in determining the next step and may refer them to other appropriate resources.

V. Publicity and Advertising

1. Truth in Advertising

A mediator will not make false or misleading statements regarding his or her own abilities and qualifications, or about the mediation process and its costs and benefits.

VI. Professional Relationships

1. Relationships with other Mediators

In situations where more than one mediator is participating, each has a duty to keep the other informed of developments essential to a cooperative effort.

2. Relationships with other Professionals

A mediator should respect the complementary relationship between mediation and legal, mental health, and other social and medical services and should promote cooperation with other professionals.

VII. Training and Continuing Education

1. Training A mediator has a duty to acquire substantive knowledge and procedural skill in conducting the basic mediation process as well as areas of specialization.

2. Continuing Education

A mediator has a responsibility to participate in continuing education and ongoing professional growth. A mediator is encouraged to join with other mediators and members of related professions to promote professional development.

VIII. Advancement of Mediation

1. Mediation Service

A mediator is encouraged to provide some mediation service in the community for a nominal or no fee and to act as a mentor for others who are entering the profession.

2. Promotion of Mediation

A mediator has a duty to promote the advancement of mediation by encouraging and participating in research, publishing or other forms of professional and/or public information and education.