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The Revised Model Standards of
Conduct of Mediators

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An ADR Song



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The Wrong Model, Again

Why the devil is not in the details of the New Model Standards of Conduct for Mediators

BY MICHAEL L. MOFFITT

THE MODEL STANDARDS OF Conduct for Mediators have been revived. To be certain, all of us who care about mediation should be interested in finding ways to promote high-quality, ethical practices. The current version of the Model Standards, however, is more harmful than helpful.

A joint committee of the American Bar Association, the American Arbitration Association and the Association for Conflict Resolution recently redrafted the ethical framework originally crafted and promulgated in 1994. As with the earlier version of the Model Standards, the 2005 version's explicit aim is to guide mediators' conduct, to inform mediation parties and to promote public confidence in mediation.¹ Wayne Thorpe and Susan Yates provided a comprehensive survey of the new Model Standards in the Winter 2006 issue of *Dispute Resolution Magazine*.²

I offer this critique with great respect for those who drafted the Revised Model Standards, and in particular for Professor Stulberg, whose accompanying article makes it clear that he and I disagree on at least some aspects of how best to assure the quality of mediation services. I sincerely hope that we in the mediation community will continue our conversations about mediators' standards of practice, with the shared aim of improving the articulation of mediation's foundational ethics.

It would be easy to pick at some

of the details of the Model Standards because they form a complex document, drafted by a committee of talented but disparate members. I am confident that most practitioners would look at the Model Standards and find at least a few things with which to quibble.

But this is a case in which the devil is not in the details. Instead, the problem with the Model Standards is the very framework they adopt as their basis. The template for the Model Standards is so fundamentally flawed that no matter how the drafters filled it in, the final product was bound to be problematic.

The 2005 version of the Model Standards not only fails to correct the mistakes of the first effort, it also compounds those errors by inviting the establishment of a dangerous standard of practice. I hope that at some point, one or more of the sponsoring organizations will reconsider its support for this document. After careful consideration, I reluctantly conclude that it would be better for mediation to be a practice with no articulation of ethical principles than to have this document be perceived as our shared statement of ethical parameters.

Problem #1: *The Model Standards ignore ethical tensions.*

Ironically, for a document that purports to provide ethical guidelines for practitioners, the Model Standards ignore the very prospect of any ethical tensions in the practice of mediation. Instead, they merely set out a series of absolute, hortative prescriptions, such as the following: "Mediators shall conduct a mediation based on the principle of party self-determination." "A mediator shall conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality." "A mediator shall conduct a mediation in a manner that promotes

diligence, timeliness, safety, presence of the appropriate participants, party participation, procedural fairness, party competency and mutual respect among all participants." And the list goes on.

Most mediators would agree that an ideal mediation would include each of the values articulated above. An ideal mediation would be one in which a mediator protected participants' ability to decide for themselves, did so in a way that appeared impartial and promoted the appropriate participation of every interested party.

But the reality of mediation practice makes these ideals just that—ideals. Complex cases and the reality of human interaction produce instances in which ethical tensions arise, circumstances in which two or more competing values are pitted against one another. It is no ethical tension for a mediator to sit and wonder, "Should I protect party self-determination?" The answer is clearly yes. We need no standards of practice to tell us that.

We need ethical guidelines precisely when ethical challenges arise. And a case produces an ethical tension when a mediator's action to support one value may risk some other value. In other words, ethical dilemmas arise when there is some acknowledged tension between competing values. If I value self-determination and informed consent, I should be concerned that the plaintiff appears to be settling this claim in complete ignorance of the relief the law would afford. And yet if I value the appearance of impartiality, I cannot intervene in any way that would appear to have me favoring the plaintiff's interests over those of the defendant. It is no answer to say that I should advise the plaintiff to seek an attorney's help, because the very act of doing so, particularly if it comes precisely at the moment just before settlement, will reasonably



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be perceived by the defendant as conduct favoring the plaintiff. That is an ethical tension—a real world occurrence in which two or more of the important values may not be perfectly preserved simultaneously. And the practice of mediation is filled with such moments.

The first failing of the Model Standards is that their structure suggests that such tensions do not arise. Within the entirety of the Model Standards, in only one instance do they acknowledge even the possibility of a tension—between “informed consent” and “quality of the process.” Instead, the standards tell us, in absolute terms, that we who mediate are simply to uphold every one of these standards at an absolute level. According to the Model Standards, mediators shall maintain impartiality and self-determination and procedural fairness and mutual respect, to name a few. “Just do it” is the unarticulated guidance the standards offer mediators. As sources of insight into the ethical realities of mediation, therefore, the standards fall woefully short.

I can imagine a set of practice descriptions that would make important ethical tensions explicit. The community of mediators could articulate a set of values it considers fundamental to the integrity of mediation practice, and then acknowledge the circumstances in which some of these values may come into tension in practice. The community could demand a certain minimum fidelity to these principles, without suggesting that a mediator can necessarily perfectly adhere to these aspirational goals at all times. Following the adoption of the first set of Model Standards of Practice in 1994, I co-authored a law review article suggesting that the original version of the Model Standards failed for this very reason—because they failed to acknowledge or deal with ethical tensions.³

If I am correct in my assertion that practicing mediators experience circumstances in which two or more of the values articulated in the Model

Standards come into tension, then the structure of the Model Standards is unhelpful. To assert simply that mediators must adhere absolutely to every value is misleading and unhelpful. As a description of the ethical landscape for mediators, therefore, the Model Standards fall short.

Problem #2: *The Model Standards create no hierarchy of ethical concerns, providing no guidance to practitioners.*

I am not suggesting that idealized principles have no possible role in ethical standards. I could imagine a very helpful document laying out a handful of aspirational standards—but only on one of two conditions. Either the document must explicitly name the standards as aspirational or it must set out a hierarchy among the standards it articulates. The Model Standards do neither.

In lawyers’ ethics, we see a model of hierarchical values. Lawyers have a duty to protect a client’s interests and confidences. They owe a duty of candor to the court. They have a duty to provide pro bono legal services to those who cannot afford to pay. In an idealized setting, an attorney can accomplish each of these to an absolute level. But when push comes to shove, in the moment of greatest ethical tension, attorneys’ ethical codes provide guidance about which of these ideals trumps. An attorney’s duty to provide competent service to existing clients trumps the duty to provide pro bono services. And an attorney’s duty of candor to the court trumps even the duty of client loyalty.⁴

Perhaps the Model Standards could maintain their current structure if the sponsoring organizations were willing to articulate an overarching ethical norm—a single value that would trump others. But that’s not what the Model Standards include—probably because there is nothing close to a consensus among mediation practitioners about which values should be seen as highest. Is impartiality more important than party self-determination? More important than informed consent? More

important than “procedural fairness”? Lawyers may be able to say that they are foremost officers of the court. Doctors may be able to say that they first ought to do no harm. Mediators, at the moment at least, have yet to articulate such an overarching ethic.

The Model Standards structure themselves in a way that demands some sort of hierarchy, but they provide none. In the one place where they acknowledge the possibility of a tension, the Model Standards simply say that “a mediator may need to balance such party self-determination with a mediator’s duty to conduct a quality process in accordance with these Standards.” What guidance can we take from this? Not much. Only that, apparently, neither of these two values stands reliably above the other in terms of a hierarchy of ethical considerations for mediators. As a result, mediators must balance them. As a source of guidance, therefore, the Model Standards fall short.

Problem #3: *Despite these shortcomings, the Model Standards purport to establish a standard of practice.*

The most significant addition to the latest version of the Model Standards is probably also its most troublesome feature. Buried at the bottom of a new section inconspicuously labeled “Note on Construction” sits this paragraph:

These Standards, unless and until adopted by a court or other regulatory authority, do not have the force of law. Nonetheless, the fact that these Standards have been adopted by the respective sponsoring entities should alert mediators to the fact that the Standards might be viewed as establishing a standard of care for mediators.

What a casual reader may miss in the standards is that they are no longer simply a collection of aspirations. The very terms of the standards seem to invite others to view them as establishing a standard of care—or at the very least do not discourage others

from reading them that way.

Why does this matter? In short, it matters because it signals the prospect that these flawed standards may be used as the basis of a malpractice action against a mediator.

I have spent much of the past several years examining the question of mediator misbehavior and the prospect of mediator liability.⁵ Part of the reason we see so few successful judgments against mediators for malpractice is that mediation practices are so varied that it is difficult for a prospective plaintiff to demonstrate that a mediator has breached some noncontractual duty. In other words, part of the reason mediators have enjoyed de facto immunity from lawsuits is that it is difficult to say which mediator behaviors have fallen below the standard of care reasonably expected within the community of mediation practitioners.

As I have articulated in other articles, I think malpractice liability may be an important and underused vehicle for curtailing truly awful mediator misbehavior. But exposing mediators to liability for breaching unattainable standards makes no sense. In short, the Model Standards set up a fictitious standard of care—one that I would expect responsible practicing mediators to oppose.

I wonder how practicing mediators would feel if the Model Standards were articulated differently (but to the same effect). As a mental exercise, when you reread the Model Standards, in lieu of the phrase "A mediator shall," substitute the phrase, "It shall be professional misconduct tantamount to negligence for a mediator not to..." Mediators are negligent if they conduct a mediation in which the basis is not self-determination, if they fail to avoid the appearance of a conflict of interest, if they fail to conduct themselves in an impartial manner, if they fail to promote procedural fairness, and party competency, and diligence, and mutual respect among all participants.

It could be that part of the problem is that the Model Standards provide very little interpretive guidance.

Perhaps I would be less nervous if I knew what the drafters intended each provision to mean—and knew that others would interpret it similarly. But unlike the attorneys' ethical rules, the Model Standards provide neither extensive notes nor illustrative examples to give flesh to the broad pronouncements. Furthermore, no Bar committee or other interpretive body exists to provide official clarification. Each of us is left to make meaning of phrases like "conduct[ing] a mediation based on the principle of self-determination." That would be appropriate if these were aspirational goals, but not if the prospect of liability hangs in the balance.

Because the Model Standards seem to welcome the prospect of being treated as a standard of care, they go from being descriptively inaccurate and ethically unhelpful to being actually dangerous to practicing mediators. What if I find myself in a genuine ethical dilemma? Should I disclose this information that I have learned in order to preserve informed consent, but potentially at the expense of perceived impartiality? Should I suggest that we include a currently absent party, even though doing so will disrupt the explicit choices of one or more of the parties? Should I make a suggestion I genuinely believe will move the discussions forward, even though I think that one side may be offended at my suggestion? In these situations, mediators will find no guidance from the Model Standards. Instead, what they will find is that whatever they decide, they may face the prospect of liability for having failed to live up to one of the multiple, absolute, unattainable ideals articulated as ethical baselines.

Conclusion

The Model Standards are descriptively inaccurate, prescriptively inadequate and unjustifiably expansive.

The Model Standards could have been helpful. They could have helped to articulate the circumstances in which various of mediation's primary values come into tension with

one another. But that's not what the Model Standards do. Instead, they treat mediation ethics as if they were simply an exercise in good care—as though mediators who behave well never see these values in tension.

The Model Standards could have taken a first step at articulating an overarching value for mediation or a hierarchy of values. But that's not what the Model Standards do. Instead, they treat each of the many values that make up some visions of mediation as an absolute, inviolate, co-equal principle—providing no guidance to those who feel they are forced to choose.

The Model Standards could have been careful to describe the ideals they articulate as aspirational, and therefore, not as standards of care. But that's not what the Model Standards do. Instead, they explicitly invite others to consider their poorly articulated guidelines as establishing a standard of care for liability purposes. The Model Standards are no model of how mediators' ethics should be conceived.

ENDNOTES

¹ For a current version of the Model Standards of Conduct for Mediators, see www.abanet.org/dispute.

² Wayne Thorpe & Susan Yates, *An Overview of the Revised Model Standards of Conduct for Mediators*, DISP. RESOL. MAG. 30 (Winter 2006).

³ See Jamie Henikoff and Michael Moffitt, *Remodeling the Model Standards of Conduct for Mediators*, 2 HARVARD NEGOT. L. REV. 87 (1997).

⁴ Compare MODEL RULES OF PROFESSIONAL RESPONSIBILITY 1.1, 1.6, 3.3, and 6.1.

⁵ See Michael Moffitt, *Suing Mediators*, 83 BOSTON UNIV. L. REV. 147 (2003); Michael Moffitt, *Ten Ways to Get Sued: A Guide for Mediators*, 8 HARVARD NEGOT. L. REV. 81 (2003); Michael Moffitt, *Mediator Accountability: Ethical and Legal Standards of the Profession*, AM. J. OF TRIAL ADVOCACY 47 (2005); Michael Moffitt, *Promises, Promises: Mediators and Their Contracts*, in ALTERNATIVES: CPR INSTITUTE FOR DISPUTE RESOLUTION (January 2004); Michael Moffitt, *What Me Liable? A Checkup for Mediators*, DISP. RESOL. MAG. 25 (Summer 2003).

The Model Standards of Conduct

A reply to Professor Moffitt

BY JOSEPH B. STULBERG

THE ADOPTION OF THE MODEL Standards of Conduct for Mediators (September 2005) signals an important development in the dispute resolution field. Promoting their broad-based understanding is a significant, continuing responsibility of their sponsoring organizations and those involved in their development.¹ In that spirit, I welcome the opportunity to respond to Professor Michael Moffitt's provocative critique and rejection of the Model Standards.²

Professor Moffitt makes three central claims. He asserts that the Model Standards (a) erroneously suggest that tensions among the standards do not arise; (b) fail to articulate "an overarching value for mediation or a hierarchy of values, thereby providing no definitive guidance to practitioners;" and (c) disserve practitioners by suggesting the Model Standards establish a standard of care on which someone could predicate mediator liability, when they are, according to Moffitt, "unattainable standards" with which a practitioner could not comply. Those claims are both descriptively inaccurate and conceptually unpersuasive; I hope that by showing why that is so, we gain an enriched understanding of the Model Standards.

Interplay among the standards

Professor Moffitt believes that for the Model Standards to provide guidance in their current structure, they need two features that he claims are absent: (1) They must acknowledge that ethical tensions for mediators arise when two or more values of the mediation process conflict, and (2) Unless merely aspirational in purpose, the Model Standards must evidence a hierarchy

among them, thereby crystallizing "an overarching ethical norm—a single value that would trump others."

Professor Moffitt's first claim is wrong descriptively. As for his second claim, the Model Standards do identify a hierarchy among some standards, but do not embrace his suggestion that there is one single value (or standard) that trumps all others. By not embracing Professor Moffitt's call for a "single value that trumps all others," the Model Standards take the more desirable conceptual approach.

The Model Standards recognize the possibility of conflict among standards³ in multiple areas and suggest how those conflicts should be handled. Professor Moffitt claims that the drafters view each standard as "an absolute, inviolate, co-equal principle—providing no guidance to those who feel they are forced to choose."⁴ That claim is importantly wrong—the drafters were much more nuanced—and the following provisions are illustrative. After each example I explain how a practicing mediator might interpret the language.

Standard III: Conflicts of Interest

(E) If a mediator's conflict of interest might reasonably be viewed as undermining the integrity of the mediation, a mediator shall withdraw from or decline to proceed with the mediation regardless of the expressed desire or agreement of the parties to the contrary.

Mediator's Response: "My obligation to be impartial, set out in Standard II, and my obligation to conduct a quality mediation process, set out in Standard VI, trump my duty to promote party self-determination (Standard I(A)) as to mediator selection."

Standard IV: Competence

(A) A mediator shall mediate

only when the mediator has the necessary competence to satisfy the reasonable expectation of the parties.

(B) If a mediator, during the course of a mediation, determines that the mediator cannot conduct the mediation competently, the mediator shall discuss that determination with the parties as soon as is practicable and take appropriate steps to address the situation, including but not limited to, withdrawing or requesting appropriate assistance.

Mediator's Response: "My obligation is to mediate only if I have the competence to do so. Even if the parties believe I am competent (Standard IV (A)), I may realize that I am not (Standard IV (B)). In that instance, (B) takes priority over (A), and I must take some action—bring in a co-mediator or withdraw—to address the matter."

Standard VI: Quality of the Process

(A)(5) [A] mediator may provide information that the mediator is qualified by training or experience to provide, only if the mediator can do so consistent with these Standards.

Mediator's Response: "If a party or counsel ask me for my assessment of the law governing a contested matter, I can respect that exercise of party self-determination (Standard I(A)) and, if qualified, provide that information (Standard VI(A)(5)), but I can do so only if I can remain impartial (Standard II(B)), so Standard II takes priority."

Standard VIII: Fees and Other Charges

VIII (B)(2): While a mediator may accept unequal fee payments from the parties, a mediator should not allow such a fee ar-



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rangement to adversely impact the mediator's ability to conduct a mediation in an impartial manner.

Mediator's Response: "If the plaintiff contributes nothing to the payment of my fee and the defendant pays the entire fee, that is acceptable (Standard VIII (B) (2)) as long as it does not undermine my ability to conduct the mediation impartially (Standard II (B)). In assessing the appropriate balance, Standard II (B) trumps."

The possibility of multiple answers

Professor Moffitt lauds documents such as the lawyers' Model Rules of Professional Responsibility because he claims that they provide clear, unequivocal answers. "When push comes to shove, in the moment of greatest ethical tension, attorneys' ethical codes provide guidance about which of these ideals trumps."⁵ He criticizes the Model Standards for not providing similar certainty, given that the standards are designed to guide mediator conduct. While there is much to commend the approach Professor Moffitt endorses, and it is one that lawyers particularly might find appealing, it strikes me there is ample room for differences of opinion regarding the degree of guidance a governing document ought to provide.

In my judgment, an approach that embraces a desire for certainty, even if conceptually plausible (which I do not believe it is), is purchased at the cost of underestimating and disregarding the richness and unpredictability of the human experience, including mediation sessions. In his earlier work criticizing the original Model Standards,⁶ Professor Moffitt offers a framework for analyzing mediator ethical dilemmas and walks through an example where considerations of self-determination, impartiality and informed consent clash. That is a wonderful exercise—for a classroom or practitioner discussion. Such an approach does not translate into a viable "Code;" more importantly, it does not negate the value of articulating standards of practice.

Yes, one consequence of providing guidance at a more general level than the exhaustive, answer-book approach that Professor Moffitt appears to endorse is that it leaves open the possibility that there might be two or more compelling interpretations that generate different results when deciding how best to resolve a given dilemma. It does not follow from that, however, that "any rationalization" is compelling. I think that this general mode of guidance and interpretation is more desirable and appropriate—and akin to how we use and interpret the U.S. Constitution, for example—than is the call for a mechanical application of one supreme value. Does that mean that the Model Standards might be "ambiguous" on various questions? Yes. But that certainly does not entail that the standards, because of ambiguity in the hard case, are "structurally deficient."

Performance standards

The Model Standards reflect important, considerable changes in format from the 1994 version.⁷ One significant structural change is to target the statement and application of the standards to mediators. Another change is the addition of a statement in the introductory paragraphs that explicitly indicates that a practicing mediator should be aware that some court or regulatory authority might look to these standards as establishing a standard of care for mediators.⁸ Professor Moffitt criticizes the latter language because he asserts that the Model Standards lack sufficient clarity to guide mediator conduct.

I do not believe that Professor Moffitt's substantive critique is accurate—i.e. that the standards are so "incoherent" or non-sensible that an individual could not comply with them and that, therefore, predicating liability on such standards violates the morally important *ought-implies-can* thesis. But, more to the point, Professor Moffitt's criticism is misdirected, for the question this introductory language addresses is how other people or agencies, not mediators, might view the Model Standards. During

Committee deliberations, there was evidence that a substantial number of court systems in various states had adopted, either verbatim or in substantial measure, the 1994 version as governing norms for their programs.⁹ So, as a matter of alerting colleagues to potential developments, this new paragraph is important empirically.

I applaud Professor Moffitt for constructively suggesting alternative ways to approach the challenges that confronted the drafters. However, I personally find each of his proposed options unhelpful for guiding mediator conduct and unpersuasive conceptually. Professor Moffitt reluctantly concludes that mediation practice is better off without an articulation of principles than it is having the Model Standards perceived as a shared statement of ethical parameters. I could not disagree more.

ENDNOTES

¹ The author served as the Reporter to the Joint Committee that developed the Model Standards of Conduct for Mediators (September 2005). The views expressed here represent those of the author and do not constitute an official statement of the Committee.

² Michael L. Moffitt, *The Wrong Model, Again: Why the devil is not in the details of the New Model Standards of Conduct for Mediators*, DISP. RESOL. MAG. 31 (Spring 2006).

³ The Model Standards also recognize that the application of a standard may be affected by sources other than competing standards; these would include applicable law, court rules, regulations, and other applicable professional rules. See "Note on Construction," ¶ 5.

⁴ Moffitt, *supra* note 2.

⁵ Moffitt, *supra* note 2.

⁶ Jamie Henikoff and Michael Moffitt, *Remodeling the Model Standards of Conduct for Mediators*, 2 HARV. NEG. L. REV. 87 (1997).

⁷ See R. Wayne Thorpe and Susan M. Yates, *An Overview of the Revised Model Standards of Conduct for Mediators*, DISP. RESOL. MAG., Winter 2006, at 30, and Reporter's Notes, pp. 4-8 (2005).

⁸ See "Note on Construction," ¶ 6.

⁹ See Reporter Notes (Sept. 9, 2005), n.2, and research materials on file with Author.