

# **Ethical Considerations for Use of Online Tools for Dispute Neutrals in the COVID-19 Era**

Presented by the  
American Bar Association  
Section of Dispute Resolution and  
ABACLE



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Dantel Ratney



# Ethical Considerations for the use of Online tools



# Ethical Principles (NCTDR)

**Ethics** = High level statements of principle, often thought of as “moral guidance,” that define the atmosphere or conditions in which practitioners aspire to work.

# Ethical Principles (NCTDR)

Accessibility

Accountability

Competence

Confidentiality

Empowerment

Equality

Fairness

Honesty

Impartiality

Informed Consent

Innovation

Integration

Legal Obligation

Neutrality

Protection from Harm

Security

Transparency

[www.odr.info](http://www.odr.info)

# Standards of Practice

**Standards** = Practical level  
guidance on how to behave within  
the parameters set by the  
profession's ethical principles.

(e.g., Model Standards of Conduct for Mediators  
ABA/ACR/AAA)



# Model Standards of Conduct

- Self Determination
  - Impartiality
- Conflict of Interest
  - Competence
  - Confidentiality
- Quality of the Process
- Advertising & Solicitation
  - Fees & Other Charges
- Advancement of Mediation Practice

# Model Standards of Conduct

The impact of Model Standards, for purposes of this session, can be felt in:

Choosing Platforms

Preparing *You* to Work Online

Preparing Parties to Work Online

Your Conduct in the Sessions

# Model Standards of Conduct

- **Self Determination**
  - Impartiality
- **Conflict of Interest**
  - **Competence**
  - **Confidentiality**
- **Quality of the Process**
- **Advertising & Solicitation**
  - **Fees & Other Charges**
- **Advancement of Mediation Practice**

# Self-Determination

**Choosing Platforms:** Identifying safe, accessible platforms.

**Preparing *You*:** Learning to use and explain the platforms.

**Preparing Parties:** Making sure they can access and understand the implications of online work.

**Your Conduct:** Ensuring access, ensuring comfort, managing power imbalances.

# Competence

**Choosing Platforms:** Doing your homework on what is available.

**Preparing *You*:** Testing and using the platforms to ensure understanding and ease of use.

**Preparing Parties:** Training/testing with them, troubleshooting problems, confirming use.

**Your Conduct:** Conducting process checks, having a “plan B,” frequent reality checks.

# Confidentiality

**Choosing Platforms:** Checking security protocols for platforms.

**Preparing *You*:** Making sure you understand and can explain the level of security.

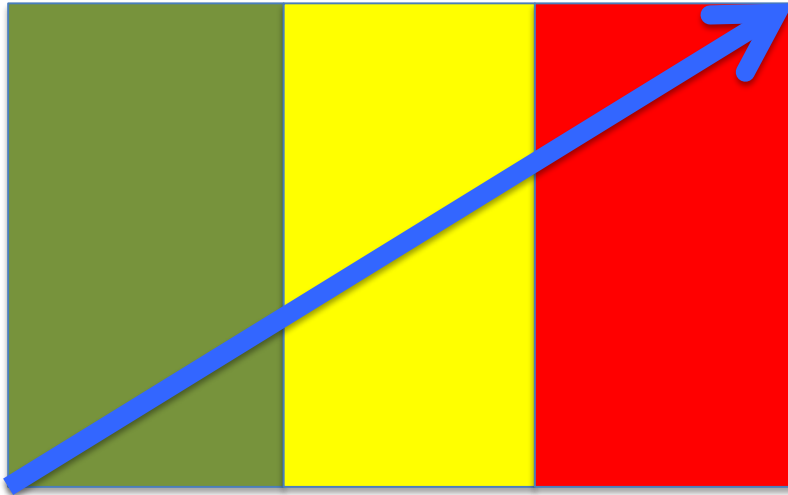
**Preparing Parties:** Explaining risk and security, explaining your records policy.

**Your Conduct:** Working with parties to match the level of damage or risk against the likelihood of exposure.

# Risk/Damage Assessment



# Risk/Damage Assessment



If the risk of inadvertent sharing of information is high, *and* the damage is great, *and* an economically feasible, safe alternative is available, it is unethical to not use the safer alternative.



# Technology's Role

Generally, you should think of technology as an extension of you, and a reflection on your competence and your practice.

Using technology changes the channels of communication, and the interaction dynamic – you can never make online work exactly like face-to-face work, but you can adhere to the ethical principles that help create a positive conflict engagement environment.

# Ethical Considerations for the use of Online tools

## *Questions & Discussion*





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*Frank Fowlie & Sher Shah Khan*

# Model Standards of Conduct for Mediators

[Annotated for Online Dispute Resolution Practice in 2016]\*

Daniel Rainey\*\*

[Annotations indicated with italics]

AMERICAN ARBITRATION ASSOCIATION  
(ADOPTED SEPTEMBER 8, 2005)  
AMERICAN BAR ASSOCIATION  
(ADOPTED AUGUST 9, 2005)  
ASSOCIATION FOR CONFLICT RESOLUTION  
(ADOPTED AUGUST 22, 2005)

The Model Standards of Conduct for Mediators was prepared in 1994 by the American Arbitration Association, the American Bar Association's Section of Dispute Resolution and the Association for Conflict Resolution.<sup>1</sup> A joint committee consisting of representatives from the same successor organizations revised the

\* *Online Dispute Resolution, ODR, has been a topic of discussion in the conflict and dispute engagement world since at least the mid-1990s. Initially, and still to some degree, the discussion has revolved around issues related to e-commerce, to a great degree because that was the place where we first noticed conflict being created online that could only be effectively resolved online.*

*A more reasonable current definition of ODR would broaden the scope greatly and could be expressed as simply "the application of any information and communication technology (ICT) to the process of dispute engagement", whether online or via technology that resides outside the Internet and the Web on some computing device.*

*Whether we think consciously about it or not, when we first used computers to draft agreements, keep notes, communicate via e-mail, etc., we began using ODR tools, and the use of those tools has affected our practice. The addition of the Internet and the Web has further complicated the impact of ODR tools, but any discussion of the impact of ODR on the practice of mediation (or other dispute engagement modes) has to include all of the phones, smartphones, tablets, laptops, desktops, etc., that mediators may use as part of their interaction with the parties. Owing to the pervasive nature of information and communication technology, we are all, to some degree, engaged in the practice of ODR.*

\*\* *The notations made to these model rules were made under the direction of Daniel Rainey, Board Member of the InternetBar.Org (<http://danielrainey.us>), in dialogue with Susan Nauss Exon, Professor of Law at La Verne School of Law, and with the assistance of graduate students in the Dispute Resolution Program at Southern Methodist University. The annotation team consisted of Betsy Attel, Ann Ellison, Dana Garnett, Brandon Hillhouse, Joseph Kanu, Izzy Lewis, Sarah Nevins Al-Zubi, David Russell, Jeffrey Thompson, Yanina Vashchenko, and Niki Watson. The purpose of the annotation project is to begin a discussion regarding how to update the model rules and to accommodate changes in practice that have occurred as a result of the integration of a wide range of information and communication technology (ICT) into mediation and other forms of conflict or dispute engagement.*

1 The Association for Conflict Resolution is a merged organization of the Academy of Family Mediators, the Conflict Resolution Education Network and the Society of Professionals in Dispute Resolution (SPIDR). SPIDR was the third participating organization in the development of the 1994 Standards.

Model Standards in 2005.<sup>2</sup> Both the original 1994 version and the 2005 revision have been approved by each participating organization.<sup>3</sup>

#### *Preamble*

Mediation is used to resolve a broad range of conflicts within a variety of settings. These Standards are designed to serve as fundamental ethical guidelines for persons mediating in all practice contexts. They serve three primary goals: to guide the conduct of mediators; to inform the mediating parties; and to promote public confidence in mediation as a process for resolving disputes.<sup>4</sup>

Mediation is a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision-making by the parties to the dispute.<sup>5</sup>

Mediation serves various purposes, including providing the opportunity for parties to define and clarify issues, understand different perspectives, identify interests, explore and assess possible solutions, and reach mutually satisfactory agreements, when desired.

#### *Note on Construction*

These Standards are to be read and construed in their entirety. There is no priority significance attached to the sequence in which the Standards appear.

The use of the term ‘shall’ in a Standard indicates that the mediator must follow the practice described. The use of the term ‘should’ indicates that the practice described in the standard is highly desirable, but not required, and is to be departed from only for very strong reasons and requires careful use of judgment and discretion. The use of the term ‘mediator’ is understood to be inclusive so that it applies to co-mediator models.

- 2 Reporter’s Notes, which are not part of these Standards and therefore have not been specifically approved by any of the organizations, provide commentary regarding these revisions.
- 3 The 2005 revisions to the Model Standards were approved by the American Bar Association’s House of Delegates on 9 August 2005, the Board of the Association for Conflict Resolution on 22 August 2005 and the Executive Committee of the American Arbitration Association on 8 September 2005.
- 4 *Mediation is one form of dispute engagement, and it is the primary form addressed by the model rules. However, there are many modes of engagement, ranging from facilitation/conciliation/mediation to comprehensive peacebuilding. All modes of dispute engagement are affected by the use of ICT. Discussion of the model rules for mediation can be used as a point of reference for discussion of the impact of ICT on any and all dispute intervention modes. As practitioners, we must reconsider all modes of alternative dispute resolution practice in light of the communication, information sharing and group management tools presented by ICT.*
- 5 *The parties involved in dispute engagement have been expanded by the use of ICT. At the most basic level, the concept of the Fourth Party, as enunciated by Ethan Katsh and Janet Rifkin in Online Dispute Resolution: Resolving Conflicts in Cyberspace, assumes that the technology itself, the channel used to communicate, has an impact and plays a role in the developing dynamic of any dispute. Further, if third parties are using online platforms (text-only, audio, or audio and video) the developer of the platform has an impact on the dispute engagement because of the approaches or assumptions he or she builds into the platform. And, even further, if the dispute engagement involves the use of cloud servers to host the software or to archive communication related to the engagement, the provider of the cloud ‘space’ may be legitimately considered as a party to the dispute engagement.*

These Standards do not include specific temporal parameters when referencing a mediation, and therefore do not define the exact beginning or ending of a mediation.

Various aspects of a mediation, including some matters covered by these Standards, may also be affected by applicable law, court rules, regulations, other applicable professional rules, mediation rules to which the parties have agreed and other agreements of the parties. These sources may create conflicts with, and may take precedence over, these Standards. However, a mediator should make every effort to comply with the spirit and intent of these Standards in resolving such conflicts. This effort should include honouring all remaining Standards not in conflict with these other sources.

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.

## **Standard I. Self-determination**

A. A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome. Parties may exercise self-determination at any stage of a mediation session, including mediator selection, process design,<sup>6</sup> participation in or withdrawal from the process and outcomes.

- 1 Although party self-determination for process design is a fundamental principle of mediation practice, 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.<sup>7</sup>
- 2 A mediator cannot personally ensure that each party has made free and informed choices to reach particular decisions, but, where appropriate, a mediator should make the parties aware of the importance of consulting other professionals to help them make informed choices.

B. A mediator shall not undermine party self-determination by any party for reasons such as higher settlement rates, egos, increased fees or outside pressures

6 *Questions of process design have traditionally revolved around issues related to the North American Model, the degree to which a mediator is 'evaluative' or 'facilitative', etc. The introduction of ICT into the process of mediation introduces the concept of 'computer literacy' and the capacity to understand the implications of using or not using ICT as part of the mediation process. If the parties are able to exercise self-determination in process design, it is imperative that the third party be able to describe the use of ICT or the decision not to use ICT, in a way that is understandable to the parties, both in terms of process and in terms of potential impact on the outcome of mediation.*

7 *For the mediator, this may mean not avoiding the use of ICT because of a personal bias or proclivity, and not pressing the use of ICT as a result of the mediator's personal preference.*

from court personnel, programme administrators, provider organizations, the media or others.<sup>8</sup>

## Standard II. Impartiality<sup>9</sup>

A. A mediator shall decline to mediate if the mediator cannot conduct it in an impartial manner. Impartiality means freedom from favouritism, bias or prejudice.<sup>10</sup>

B. A mediator shall conduct a mediation session in an impartial manner and avoid conduct that gives the appearance of partiality.

- 1 A mediator should not act with partiality or prejudice based on any participant's personal characteristics, background, values and beliefs or performance at a mediation or any other reason.<sup>11</sup>
- 2 A mediator should neither give nor accept a gift, favour, loan or other item of value that raises a question as to the mediator's actual or perceived impartiality.
- 3 A mediator may accept or give *de minimis* gifts or incidental items or services that are provided to facilitate a mediation or respect cultural norms so long as such practices do not raise questions as to a mediator's actual or perceived impartiality.

C. If at any time a mediator is unable to conduct a mediation session in an impartial manner, the mediator shall withdraw.

8 Does the decision to use an ICT platform for which the mediator has paid to purchase or for which he or she is paying an ongoing fee, risk the perception of bias? If the mediator suggests using a platform for which he or she is paying, and the fee for services is used to cover the overhead cost of that platform, can that be considered, or is the cost of the platform merely overhead in the same way the cost of an office or conference room is considered overhead? If the mediator charges parties any cost or fee to use an ICT platform, that fact may affect a party's decision to engage in ODR, and therefore should be disclosed.

9 The fourth party and the programme designers for ODR/ICT have an obligation to design platforms and systems that do not demonstrate bias toward users with advanced or limited computer literacy skills, and, perhaps more importantly, that do not build in the culturally specific assumptions about process behind the North American Model in such a way that they cannot be adapted to other culturally driven forms of mediation. For example, immediately naming the issue and framing the point of conflict, having all decision makers at the table, having a third party who is 'neutral', and proceeding towards a formal, written agreement, are all elements of our basic North American Model that in some instances are not culturally comfortable or acceptable. Developers and designers should have an obligation to create fourth party applications that are as flexible as the third party can be in a traditional face-to-face session. With the foregoing in mind, the virtual mediator has an obligation to select an appropriate ODR/ICT platform that meets the needs of the parties in an evenhanded manner.

10 Just as a mediator may show overt or unintended bias towards a party owing to clearly observable cultural signs or expressed opinions, or ability to use ICT, the mediator may show bias towards a party who does or does not agree with the mediator's bias regarding the use of ICT for mediation.

11 A mediator should confirm each participant's level of comfort with, and ability to perform using, ICT before engaging in ODR and remain free from favouritism, bias or prejudice regarding a party's performance using ICT.



### Standard III. Conflicts of interest

A. A mediator shall avoid a conflict of interest or the appearance of a conflict of interest during and after a mediation session. A conflict of interest can arise from involvement by a mediator with the subject matter of the dispute or from any relationship between a mediator and any mediation participant, whether past or present, personal or professional, that reasonably raises a question of a mediator's impartiality.<sup>12</sup>

B. A mediator shall make a reasonable inquiry to determine whether there are any facts that a reasonable individual would consider likely to create a potential or actual conflict of interest for a mediator. A mediator's actions necessary to accomplish a reasonable inquiry into potential conflicts of interest may vary based on practice context.<sup>13</sup>

C. A mediator shall disclose, as soon as practicable, all actual and potential conflicts of interest that are reasonably known to the mediator and could reasonably be seen as raising a question about the mediator's impartiality.<sup>14</sup> After disclosure, if all parties agree, the mediator may proceed with the mediation.

D. If a mediator learns any fact after accepting a mediation that raises a question with respect to that mediator's service creating a potential or actual conflict of interest, the mediator shall disclose it as quickly as practicable. After disclosure, if all parties agree, the mediator may proceed with the mediation.

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.

F. Subsequent to a mediation, a mediator shall not establish another relationship with any of the participants in any matter that would raise questions about the integrity of the mediation. When a mediator develops personal or professional

12 *A mediator's relationship with a fourth party or a designer/provider could result in a conflict of interest or the perception of a conflict of interest.*

13 *A mediator's use of ICT outside the mediation session may create the perception of a conflict of interest. For example, postings on social media sites where 'friends' are identified or where messages regarding the mediator's practice may be posted can create the impression of relationships and interests that could be perceived by one or more of the parties as biased or prejudicial. In the practice of law, the issue of online 'friendship' creating a conflict of interest has been handled differently by various venues, and posting of 'reviews' on social media has become an issue in advertising and promotion. The same issues apply to the use of social media by mediators.*

*In an age where social media is ubiquitous, it may be unrealistic to completely avoid having an online profile; however, practitioners who choose to use social media should do so in a manner that is reasonably likely to maintain the integrity of mediation consistent with these Standards.*

14 *Disclosure should include information about any platform, system or company in which the mediator has invested, or for which the mediator has been in a consulting or advisory relationship. Disclosure should also include any ICT/ODR platforms for which the mediator has an ongoing financial responsibility (licence fee or purchase cost).*

relationships with parties, other individuals or organizations following a mediation in which they were involved, the mediator should consider factors such as time elapsed following the mediation, the nature of the relationships established, and services offered when determining whether the relationships might create a perceived or actual conflict of interest.

#### Standard IV. Competence

A. A mediator shall mediate only when the mediator has the necessary competence to satisfy the reasonable expectations of the parties.

- 1 Any person may be selected as a mediator, provided that the parties are satisfied with the mediator's competence and qualifications. Training, experience in mediation, skills, cultural understandings and other qualities are often necessary for mediator competence. A person who offers to serve as a mediator creates the expectation that the person is competent to mediate effectively.<sup>15</sup>
- 2 A mediator should attend educational programmes and related activities to maintain and enhance the mediator's knowledge and skills related to mediation.<sup>16</sup>
- 3 A mediator should have available for the parties' information relevant to the mediator's training, education, experience and approach to conducting a mediation.

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.

C. If a mediator's ability to conduct a mediation session is impaired by drugs, alcohol, medication or otherwise, the mediator shall not conduct the mediation.

15 *There is a basic question of what 'competence' means for mediators generally. Is the number of cases mediated a measure? Does the fact that one has done 1000 cases mean one is competent, or has one merely done 1000 cases badly? There are in every state accepted 40-hour courses in mediation required before accepting court-referred mediation cases. Is completing one of these courses proof of competence? There are more than 200 degree programmes in the United States offering degrees in conflict resolution of one kind or another, most of which at least address mediation. Is having one of these degrees proof of competence? If the situation is not clear for mediation generally, adding ODR to the mix does not make it any clearer. At a minimum, the mediator should be proficient in the use of any platform he or she proposes at a high level, so that the use of the platform does not unduly take attention away from the substance of communication with the parties. How one demonstrates this is less clear. A concrete recommendation, one that is urgent, is to include modules on the impact of ICT on the practice of mediation in every mediation training course.*

16 *Mediators should attend trainings and other programmes to prepare to enter the mediation field, and continuing education to enrich one's ability to mediate. The knowledge and skills related to mediation should include information about online dispute engagement, various ODR platforms, and information and communication technology.*

## Standard V. Confidentiality<sup>17</sup>

A. A mediator shall maintain the confidentiality of all information obtained by the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law.

- 1 If the parties to a mediation agree that the mediator may disclose information obtained during the mediation, the mediator may do so.
- 2 A mediator should not communicate to any non-participant information about how the parties acted in the mediation. A mediator may report, if required, whether parties appeared at a scheduled mediation and whether or not the parties reached a resolution.
- 3 If a mediator participates in teaching, research or evaluation of mediation, the mediator should protect the anonymity of the parties and abide by their reasonable expectations regarding confidentiality.

B. A mediator who meets with any persons in a private session during a mediation shall not convey directly or indirectly to any other person any information that was obtained during that private session without the consent of the disclosing person.

C. A mediator shall promote understanding among the parties of the extent to which the parties will maintain confidentiality of information they obtain in a mediation session.

D. Depending on the circumstance of a mediation session, the parties may have varying expectations regarding confidentiality that a mediator should address. The parties may make their own rules with respect to confidentiality, or the accepted practice of an individual mediator or institution may dictate a particular set of expectations.<sup>18</sup>

17 *This is, perhaps, the most difficult standard to deal with regarding the mediator's knowledge and practice. There are certain steps that apply specifically to ODR that are basic and that should be integrated into the rules:*

- *The mediator should make himself or herself aware of the security standards used by any online platform that will pass through or hold information generated by the parties and the mediator during a mediation session.*
- *The mediator should educate herself or himself on the basics of computer security, including the security protocols used by online providers, and including the stated 'ownership' of information passed through the online channel.*
- *The mediator should be able to explain, in language the parties can understand, the perceived and actual risks to privacy and confidentiality inherent in using online or computer-based platforms or applications.*
- *The mediator should avoid using or recommending online or computer-based platforms or applications that do not meet reasonable industry standards for security and privacy protection.*

18 *Before beginning mediation, the mediator should create a protocol agreement that spells out the parties' understanding of the process, any ODR technology to be used, the actual risks to their information, and the responsibility of the mediator as it relates to confidentiality and the ability to shield online data from discovery.*

## Standard VI. Quality of the Process

A. A mediator shall conduct mediation in accordance with these Standards and 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.<sup>19</sup>

- 1 A mediator should agree to mediate only when the mediator is prepared to commit the attention essential to an effective mediation.<sup>20</sup>
- 2 A mediator should accept cases only when the mediator can satisfy the reasonable expectation of the parties concerning the timing of a mediation.
- 3 The presence or absence of persons at a mediation depends on the agreement of the parties and the mediator. The parties and mediator may agree that others may be excluded from particular sessions or from all sessions.<sup>21</sup>
- 4 A mediator should promote honesty and candour between and among all participants, and a mediator shall not knowingly misrepresent any material fact or circumstance in the course of a mediation.
- 5 The role of a mediator differs substantially from other professional roles. Mixing the role of a mediator and the role of another profession is problematic, and thus a mediator should distinguish between the roles. 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.
- 6 A mediator shall not conduct a dispute resolution procedure other than mediation but label it mediation in an effort to gain the protection of rules, statutes or other governing authorities pertaining to mediation.
- 7 A mediator may recommend, when appropriate, that parties consider resolving their dispute through arbitration, counselling, neutral evaluation or other processes.<sup>22</sup>
- 8 A mediator shall not undertake an additional dispute resolution role in the same matter without the consent of the parties. Before providing such service, a mediator shall inform the parties of the implications of the change in process and obtain their consent to the change. A mediator who undertakes such a role assumes different duties and responsibilities that may be governed by other standards.
- 9 If a mediation is being used to further criminal conduct, a mediator should take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.

19 *Before referring parties to an ODR/ICT platform, a mediator should exercise due diligence to ensure that the platform is effective and suitable for the parties and promotes a quality, trustworthy process in accordance with these Standards.*

20 *An element related to ensuring a quality process in ODR is having a mediator who is herself or himself comfortable with and able to use ODR technology without damaging the process.*

21 *For ODR, this includes agreement on who will be 'in the room' for online sessions, who will have access to any information stored online as part of the mediation, and information about how the material will be stored, by whom and when the material will be 'destroyed'.*

22 *Referral to an ODR forum should be one of the referral options for traditional mediation.*

10 If a party appears to have difficulty comprehending the process, issues, or settlement options, or difficulty participating in a mediation, the mediator should explore the circumstances and potential accommodations, modifications or adjustments that would make possible the party's capacity to comprehend, participate and exercise self-determination.

B. If a mediator is made aware of domestic abuse or violence among the parties, the mediator shall take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.

C. If a mediator believes that participant conduct, including that of the mediator, jeopardizes conducting a mediation consistent with these Standards, the mediator shall take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.<sup>23</sup>

### **Standard VII. Advertising and Solicitation<sup>24</sup>**

A. A mediator shall be truthful and not misleading when advertising, soliciting or otherwise communicating the mediator's qualifications, experience, services and fees.

- 1 A mediator should not include any promises as to outcome in communications, including business cards, stationery or computer-based communications.
- 2 A mediator should only claim to meet the mediator qualifications of a governmental entity or private organization if that entity or organization has a recognized procedure for qualifying mediators and it grants such status to the mediator.

B. A mediator shall not solicit in a manner that gives an appearance of partiality for or against a party or otherwise undermines the integrity of the process.

C. A mediator shall not communicate to others, in promotional materials or through other forms of communication, the names of persons served without their permission.

### **Standard VIII. Fees and Other Charges**

A. A mediator shall provide each party or each party's representative true and complete information about mediation fees, expenses and any other actual or potential charges that may be incurred in connection with a mediation.

23 *For an ODR session, inappropriate conduct might include flaming, lack of responsiveness, allowing access to parties not agreed to in the protocol agreement, and any other online behaviours that may interfere with mediation.*

24 *Incorporating the language and issues raised in conjunction with other elements of the model rules, this Standard can stand as it is.*

- 1 If a mediator charges fees, the mediator should develop them in light of all relevant factors, including the type and complexity of the matter, the qualifications of the mediator, the time required and the rates customary for such mediation services.<sup>25</sup>
  - 2 A mediator's fee arrangement should be in writing unless the parties request otherwise.
- B. A mediator shall not charge fees in a manner that impairs a mediator's impartiality.
- 1 A mediator should not enter into a fee agreement that is contingent on the result of the mediation or amount of the settlement.
  - 2 While a mediator may accept unequal fee payments from the parties, a mediator should not use fee arrangements that adversely impact the mediator's ability to conduct a mediation in an impartial manner.

### Standard IX. Advancement of Mediation Practice<sup>26</sup>

A. A mediator should act in a manner that advances the practice of mediation. A mediator promotes this Standard by engaging in some or all of the following:

- 1 Fostering diversity within the field of mediation.
- 2 Striving to make mediation accessible to those who elect to use it, including providing services at a reduced rate or on a pro bono basis as appropriate.
- 3 Participating in research when given the opportunity, including obtaining participant feedback when appropriate.
- 4 Participating in outreach and education efforts to assist the public in developing an improved understanding of, and appreciation for, mediation.
- 5 Assisting newer mediators through training, mentoring and networking.

25 If the use of ODR technology is provided as part of the overhead for a mediation practice, there is probably no need to itemize the cost of the technology. However, if there are special costs or fees associated with the use of an online platform, or if the use of the platform is handled as a separate item, disclosure of costs and any other ramifications of signing up for a platform must be disclosed.

26 This standard is one that bedevils almost as much as 'competence'. Whether one likes it or not, the practice of mediation is now conducted using a variety of ICT tools and platforms. Even if one only uses e-mail (a very insecure and undesirable channel) or a mobile phone, one is engaged in the practice of ODR. Although there are many legitimate issues one may raise regarding the integration of ICT into mediation, the most common complaint is that the use of online tools risks losing non-verbal nuance. This observation is so obvious as to not even rise to the level of being a critique of ODR. Of course, the non-verbal elements will change online, not just for ODR, but for all social interaction. This has been true with every advance in communication technology since the printing press, and society seems to have been able to adapt to each of the changes, as we will adapt to new online communication channels. If parties can buy airline tickets online, do their banking online and find mates to marry online, they will want to deal with mediators online. The questions for our practice, and the ethics of practice, involve how we work in this new environment in a way that does not compromise the basic principles that drive the practice of mediation.

*In order to advance the practice of mediation it is necessary to first recognize and admit the inevitable nature of the use of ODR technology, and, second, to engage in meaningful discussions about the way in which the technology should be further integrated into the practice of mediation.*

B. A mediator should demonstrate respect for differing points of view within the field, seek to learn from other mediators and work together with other mediators to improve the profession and better serve people in conflict.

#### ***Standard X. Fourth Parties, Designers, Programmers and Service Providers***

*If it is true that ODR technology is the 'fourth party' it may be necessary to establish standards of practice or model rules that go beyond the primary parties and the third party/mediator. Some of the issues related to these rules may be as follows:*

##### *Fourth Party*

- *Ease of access*
- *Ease of use*
- *Not culturally biased*
- *Not expensive or inaccessible to low-income parties*
- *Stable and reliable*
- *Secure and capable of ensuring confidentiality*

##### *Designers/Programmers*

- *Knowledge of the mediation process (and other dispute engagement modes)*
- *Knowledge of the standards and rules for third parties*
- *Strong 'user experience' skills*

##### *Service Providers*

- *High levels of data security*
- *History of ethical business practice*
- *Acknowledgment of mediation/dispute engagement special requirements*
- *Commitment to maintaining confidentiality*<sup>27</sup>

*A basic question for mediators using fourth (and fifth, etc.) parties has a parallel in the practice of law. It is the case that actions of 'agents' of an attorney (paralegals, investigators, etc.) are the responsibility of the attorney. Is the relationship between the mediator and the fourth party similar? Can the mediator be held responsible for data/confidentiality breaches or other actions that could be perceived as harmful to the parties?*

27 *In some cases it may not be clear that mediator confidentiality transfers to the service provider. For example, if a party approaches the mediator with a discovery order or a request for information and the mediator prevails owing to confidentiality provisions in her or his locale, is it possible for the requesting party to in turn seek to retrieve information from an online service provider who may or may not be afforded the same confidentiality protection as the mediator?*