

**ORDER**

**1400.10**

**EQUAL EMPLOYMENT OPPORTUNITY MEDIATION  
PROGRAM**



December 13, 1999

**DEPARTMENT OF TRANSPORTATION  
FEDERAL AVIATION ADMINISTRATION**

## RECORD OF CHANGES

**DIRECTIVE NO.**

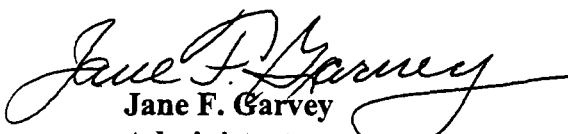
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## FOREWORD

This order establishes a mediation program for the Federal Aviation Administration that provides an alternative method for resolving allegations of discrimination raised in the Equal Employment Opportunity (EEO) process as required by Title 29 of the Code of Federal Regulations, Part 1614. This program reflects the core principles contained in the Equal Employment Opportunity Commission policy statement on Alternative Dispute Resolution. Specifically, that the program:

- Provides an impartial and independent forum for the parties to discuss their dispute.
- Allows both parties to develop a realistic assessment of their own as well as the other party's procedural and substantive alternatives.
- Promotes trust by the parties in the forum thereby facilitating the discussion of each party's perceptions.
- Ensures that the parties' legal rights are preserved.
- Has the support of upper level management.
- Ensures that the parties willingly and voluntarily agree to the resolution of the dispute.
- Ensures the confidentiality of the parties.

  
**Jane F. Garvey**  
**Administrator**

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## CHAPTER 1. GENERAL

**1-1. PURPOSE.** This order establishes and provides for a mediation program to resolve allegations of workplace discrimination and/or harassment raised through the Equal Employment Opportunity (EEO) complaint process at the Federal Aviation Administration (FAA).

**1-2. DISTRIBUTION.** This order is distributed to all managers and supervisors.

**1-3. CANCELLATION.** This order cancels Order WA 1400.2, FAA Headquarters Equal Employment Opportunity Mediation Program, dated March 4, 1998.

**1-4. BACKGROUND.**

**a. The Civil Rights Act.** The Civil Rights Act of 1991 encourages the use of Alternative Dispute Resolution (ADR) to resolve disputes arising out of discrimination and unlawful harassment in the workplace. The Equal Employment Opportunity Commission (EEOC), in its implementing regulations, provided agencies an additional 60 days in the pre-complaint stage to allow for informal resolution through the use of ADR, if all parties agree.

**b. The Administrative Dispute Resolution Act.** The Administrative Dispute Resolution Act (ADRA) of 1996 (Public Law 104-320) gives Federal agencies the authority to utilize dispute resolution methods to resolve issues in controversy that relate to an administrative program, if the parties agree to such methods.

**c. Federal Regulation.** On July 12, 1999, the EEOC published the final rule on revisions to Title 29 of the Code of Federal Regulations, Part 1614, Federal Sector Equal Employment Opportunity. The final rule requires agencies to establish or make available an ADR program for the EEO process.

**d. Executive Direction.** On May 1, 1998, President Clinton issued a memorandum to the heads of Executive departments and agencies directing each Federal agency to promote greater use of alternative means of dispute resolution.

**e. Department of Transportation Policy.** On October 16, 1998, the General Counsel signed Order DOT 2101.1, Department of Transportation Use of Alternative Dispute Resolution Methods. The order applies to all DOT activities and programs and requires that ADR techniques be used as an alternative to litigation or formal administrative procedures to the maximum extent possible. Use of these techniques may resolve all or a portion of the issue(s) in controversy. ADR processes are intended to supplement, rather than replace, existing formal procedures. Participation in an ADR process is voluntary for all parties to a dispute. All DOT officials shall consider and encourage the use of ADR to resolve conflicts and issues in controversy and ensure that all unnecessary barriers to the use of ADR are identified and removed.

**1-5. OBJECTIVE.** The objective of this program is to resolve allegations of workplace discrimination at the earliest possible stage of the EEO process. Early resolution benefits the agency by creating a more hospitable workplace for all. Other benefits for the agency include reduction of the time and significant costs associated with processing complaints.

**1-6. SCOPE.** The mediation process under this program will address matters covered by Title VII of the Civil Rights Act (discrimination on the basis of race, color, religion, sex, national origin, and reprisal), the Age Discrimination in Employment Act (discrimination on the basis of age, when the employee is at least 40 years old), the Rehabilitation Act (discrimination on the basis of physical or mental handicap), and the Equal Pay Act (discrimination on the basis of payment of wages based on sex). The mediation process may also be used to address other matters raised through the EEO complaint process; e.g., complaints of discrimination based on sexual orientation.

**1-7. DEFINITIONS.**

**a. Affected Office.** The FAA office in which the alleged discriminatory event(s) took place. This includes the lines of business (LOB), the staff offices, field offices, and facilities, as defined in the current organizational manual.

**b. Agency Official.** The individual who has the authority to grant or deny the requested relief.

**c. Agency Representative.** An individual (e.g., attorney, personnel specialist, or staff assistant) who advises the agency official about laws, regulations, and policies that govern resolution terms.

**d. Aggrieved Person.** The individual who initiates contact with an EEO counselor in an attempt to resolve informally an issue of workplace discrimination and/or harassment.

e. **ADR.** A range of problem solving processes used for resolving conflict in lieu of formal, adversarial methods like litigation. ADR may be used to resolve all or a portion of the issue(s) in controversy. These processes usually involve the use of a neutral third party who works with the parties in dispute to help them find mutually acceptable solutions. ADR processes include, but are not limited to: negotiation, facilitation, conciliation, mediation, early neutral evaluation, mini-trial, mediation-arbitration, and arbitration. Although mediation is the process selected for this program, other ADR processes may be used if the EEO Alternative Dispute Resolution Program Manager (EEO ADR PM) decides they are appropriate and the parties agree.

f. **Caucus.** Private meeting between mediator(s) and one of the parties to explore possible opportunities for resolution.

g. **Co-Mediation.** Mediation conducted by more than one mediator, working together as a team.

h. **Dispute.** The issue(s) raised in the EEO process.

i. **EEO ADR Program Manager.** The individual assigned to manage the EEO ADR program within the Office of Civil Rights or region or center Civil Rights Staff. The EEO ADR Program Manager (EEO ADR PM) is responsible for case intake, mediator assignment, integrity of the process, and monitoring/evaluating the effectiveness of the program.

j. **EEO Complaint Process.** The process described at Title 29 of the Code of Federal Regulations, part 1614, Federal Sector Equal Employment Opportunity, for raising allegations of prohibited discrimination.

k. **EEO Counselor.** A neutral individual who advises aggrieved persons about the EEO complaint process, determines the basis(es) and issue(s) of a potential complaint, conducts a limited inquiry into the allegations, seeks resolution, documents resolution or advises aggrieved persons of their right to file a formal complaint, and prepares a report on counseling activities. The EEO counselor is not a mediator and does not conduct mediations.

l. **Employee Representative.** An individual who represents the employee's interests; e.g., attorney, another employee.

m. **FAA Deputy Dispute Resolution Specialist.** The FAA's Deputy Dispute Resolution Specialist (DDRS) is the Associate Chief Counsel for Administrative Dispute Resolution. The DDRS is responsible for implementing the provision of the ADRA of 1996 and Order DOT 2101.1 within FAA.



**n. Limited Inquiry.** The collection of information with regard to an aggrieved individual's allegation. The limited inquiry is conducted by an EEO counselor as part of the pre-complaint EEO counseling process.

**o. Mediator.** A trained neutral third party. The mediator facilitates open discussion between parties in dispute and assists them to negotiate a mutually agreeable resolution. A mediator has no authority to impose a decision or resolution on the parties.

**p. Parties.** The participants in the dispute resolution process; i.e., aggrieved person and the agency official.

**q. Pre-Complaint Process.** The initial problem-solving phase of the EEO complaint process as described in 29 CFR 1614. This phase includes EEO counseling and, if elected, ADR.

**r. Resolution Agreement.** A formal written agreement which defines the terms by which the parties in dispute have agreed to resolve a dispute.

**1-8. FORMS AND REPORTS.** Appendix 1, Mediation Program Formats, contains copies of documents used in the FAA mediation process. Reproduction and use of the documents in the appendix are encouraged.

**1-9. RELATED PUBLICATIONS.** Appendix 2, Related Publications, contains additional information on the statutory, regulatory, and administrative authority for this program.

**1-10. REQUEST FOR INFORMATION.** Information on mediation may be obtained from the Office of Civil Rights or the region or center Civil Rights Staffs. General information concerning ADR may also be obtained from the Associate Chief Counsel for ADR. Consult the FAA telephone book for office locations and telephone numbers.

**1-11. AUTHORITY TO CHANGE THIS ORDER.** The Assistant Administrator for Civil Rights may issue changes to this order necessary to manage the FAA EEO mediation program.

## CHAPTER 2. PROCEDURES FOR MEDIATION

**2-1. INTRODUCTION.** The first step in initiating the EEO complaint process is for the aggrieved person to contact an EEO counselor. In accordance with 29 CFR 1614, contact with an EEO counselor must be made within 45 calendar days of the alleged act of discrimination or discriminatory harassment or the effective date of an alleged discriminatory personnel action. Mediation is an alternative method of attempting to resolve issues raised in the EEO process.

### **2-2. REQUEST FOR MEDIATION.**

**a. Mediation Option.** During the initial discussion with the EEO counselor, the aggrieved person will be informed of her/his rights in the EEO process, including the option to use ADR. The EEO counselor will inform the aggrieved person that he/she may elect to attempt resolution of the allegation(s) through mediation. Opting to attempt resolution through mediation does not abridge the aggrieved person's rights in the EEO process. By electing to enter into mediation, the pre-complaint counseling phase of the EEO complaint process is extended by 60 calendar days. However, the total time for pre-complaint processing, which includes both EEO counseling and mediation, will not exceed 90 calendar days. If mediation does not result in resolution, the aggrieved person will be referred by the EEO ADR PM to the EEO counselor to receive his or her final interview and Notice of Right to file a formal EEO complaint.

**b. Agreement to Mediate.** Agreement to enter into mediation will be documented on the Agreement to Mediate form (see appendix 1, format 1). Either the aggrieved individual or the agency official may request mediation. The EEO counselor will forward the Agreement to Mediate to the EEO ADR PM for action. The Agreement to Mediate will be considered a request until both of the parties in dispute have signed the document or the request is rescinded. Either of the parties in dispute may decline to participate in mediation.

### **2-3. ADR CASE ASSESSMENT.**

**a.** Upon receipt of a request to mediate, documented on the Agreement to Mediate form, the EEO ADR PM will review cases in accordance with Title 5, United States Code, Chapter 5, Subchapter 4, Section 572, General Authority (see appendix 3), to determine whether mediation is appropriate. Not all cases are appropriate for mediation.

**b. Other ADR Processes.** The EEO ADR PM may recommend that an ADR process other than mediation is more appropriate. In such instances, the EEO ADR PM may recommend facilitation, early neutral evaluation, or another ADR process. Participation in all ADR processes remains voluntary and must be agreed to by the aggrieved person and the agency official.

**c. Coordination with the Affected Office.** After the EEO ADR PM determines that a request for mediation from the aggrieved person is appropriate, she/he will inform the affected office of the allegations and recommend mediation as a means of resolution. The EEO ADR PM will remind the affected office that mediation is voluntary. The EEO ADR PM will obtain from the affected office the name of the person who will serve as the agency official. That person must be authorized to enter into mediation for the purpose of achieving a binding resolution on behalf of the affected office.

**d. Coordination with the Aggrieved Person.** After the EEO ADR PM determines that a request for mediation from the affected office is appropriate, she/he will inform the aggrieved person of the request and recommend mediation as a means of resolution. The EEO ADR PM will remind the aggrieved person that mediation is voluntary.

**e. Case Referral.** Based on the assessment described in paragraph 2-3a, the matter will be referred to mediation or returned to the EEO counselor to complete the pre-complaint process.

**f. Representation.** Parties to EEO disputes have the right to be accompanied, represented, and advised by a representative of their choice. The represented party will determine the role of the representative. In some circumstances, the represented party may ask the representative to speak on her/his behalf. In others, the representative will be silent and advise the represented party privately in caucus.

**g. Funding Mediation.** The affected office, responding to the allegation of discrimination or harassment, will be responsible for costs associated with the mediation. When a collateral duty FAA mediator is not available or the EEO ADR PM determines that the use of an outside mediator is appropriate, mediation costs may include, but are not limited to hourly service and/or travel costs for a contract mediator or reimbursement of costs for a Federal mediator (e.g., Federal Mediation and Conciliation Service). Field facilities may need to coordinate with their regional division manager or Washington headquarters for funding.

## 2-4. SELECTION OF MEDIATOR.

**a. Selection of Mediator.** The EEO ADR PM will review the roster of available mediators and select a potential mediator(s). To maintain impartiality in the process, the parties in dispute will not select a specific mediator(s). However, either of the parties in dispute may request a substitute mediator if there is a perceived conflict of interest.

**b. Mediator Avoidance of Potential Conflict of Interest.** The EEO ADR PM will contact the potential mediator to determine if any potential conflict of interest exists. The EEO ADR PM will inform the mediator of the name of the aggrieved person, the name of the agency official, and a summary of the allegation(s). The mediator will have the opportunity to decline, if a conflict of interest or the appearance of conflict exists. For additional information about conflicts of interest, see Appendix 4, Model Standards of Conduct for Mediators.

**c. Parties Acceptance of the Potential Mediator.** The aggrieved person and the representative from the affected office will be provided the name(s) of the mediator(s) prior to the mediation. The parties will have the opportunity to request another mediator if there is reason to believe the mediator would not be impartial. If no objections are raised, the EEO ADR PM notifies the mediator(s) that the process may begin.

## 2-5. MEDIATION.

**a. Scheduling the Mediation.** The EEO ADR PM, together with the mediator(s), will schedule mediation time(s) and place(s) with the parties. Mediation will be conducted in a neutral location.

**b. Pre-mediation Meeting.** Prior to mediation, the EEO ADR PM will separately advise the aggrieved person and the agency official about the mediation process.

**c. Preparation.** Parties should come to the mediation prepared to discuss the issues in dispute and potential ways of resolving the dispute.

**d. Mediation Session.** The mediator(s) will conduct the mediation. The parties in dispute will have an opportunity to describe their perceptions of the dispute without interruption. The mediator(s) may call for separate caucuses with each party. Mediation will continue until resolution is reached or it is clear that no resolution is possible at that time. Either disputant is free to withdraw from the mediation at any time. In the event that one party decides to withdraw from mediation, that decision should be discussed in the presence of the other party and the mediator(s).

**e. Confidentiality.** Confidentiality of the mediation session will be maintained in accordance with 5 U.S.C. Chapter 5, Subchapter IV, Alternative Means of Dispute Resolution in the Administrative Process (see appendix 3).

**f. Coordination of Resolution Terms.** Prior to signing the final agreement, the agency official, through the EEO ADR PM, will accomplish appropriate coordination of the terms of the Resolution Agreement to ensure that they are in accordance with all laws, regulations, appropriate collective bargaining agreements, and agency policy and can be administratively completed within the agreed-upon timeframe. If the resolution terms cannot be implemented as written, the EEO ADR PM will coordinate changes with the parties or arrange for another meeting between the parties and the mediator(s). Remedies available to resolve allegations of discrimination will vary depending on the authority governing relief.

**g. Resolution.** If there is an agreement in principle on the terms of a resolution, a Resolution Agreement is prepared by the mediator using format 2 in appendix 1. The Resolution Agreement is signed after the coordination described in section 2-5f is accomplished. Resolution Agreements will be signed in triplicate, one for the aggrieved person, one for the agency official, and one for the servicing Office of Civil Rights or region or center Civil Rights Staff. There is no binding agreement until the agreement has been signed by all parties.

**h. No Resolution.** If there is no resolution, the mediator will advise the EEO ADR PM, who will refer the aggrieved person back to the EEO counselor to complete the pre-complaint process. The EEO complaint process resumes at the point where ADR was elected; however, the total timeframe for the pre-complaint process shall not exceed 90 calendar days.

**i. Evaluation.** Upon completion of the mediation, the parties will be encouraged to complete an evaluation of the mediation process and forward it to the EEO ADR PM.

## **2-6. POST MEDIATION.**

**a. Execution of the Terms of the Resolution Agreement.** The parties who sign the Resolution Agreement (i.e., the agency, through the agency official, and the aggrieved individual) are responsible for executing its terms. Terms that require action by an office not present at the mediation will be coordinated with that office prior to the resolution agreement being signed by the parties.

**b. Administration of Resolution Agreements.** The EEO ADR PM will monitor compliance with Resolution Agreements reached as a result of mediation. Resolution Agreements will be kept in the FAA headquarters, region, or center Civil Rights office and a copy is provided to the departmental Office of Civil Rights.

**c. Breach of Resolution Agreements.**

(1) If the aggrieved person believes that FAA has failed to comply with the terms of the Resolution Agreement, he/she shall notify the appropriate regional departmental Office of Civil Rights.

(2) Such notice must be in writing and submitted within 30 days of the date when he/she knew, or should have known, of the alleged noncompliance. In accordance with 29 CFR, Section 1614.504, the aggrieved person may request that the terms of the Resolution Agreement be specifically implemented or, alternatively that the allegation(s) be reinstated for further action from the point the complaint processing ceased.

(3) In the event the aggrieved person alleges noncompliance and chooses to reinstate his/her allegations of discrimination, his/her request for reinstatement restores the status quo, requiring that he/she return in full to the agency any relief that has been provided.

(4) If the agency has not responded to the complainant, or if the aggrieved person is not satisfied with the agency's attempt to resolve the matter, he or she may appeal to the EEOC, Office of Federal Operations, for a determination as to whether the agency has complied with the terms of the Resolution Agreement. The aggrieved person may file such an appeal 35 days after he or she has served the agency with the allegations of noncompliance, but must file an appeal within 30 days of his or her receipt of an agency's determination. The aggrieved person must serve a copy of the appeal on the agency, and the agency may submit a response to the EEOC within 30 days of receiving notice of the appeal.

### CHAPTER 3. FEDERAL AVIATION ADMINISTRATION EEO MEDIATORS

**3-1. MEDIATORS.** The Office of Civil Rights and region or center Civil Rights staffs may have their own cadre of collateral-duty or full-time FAA EEO mediators.

**3-2. RECRUITMENT OF MEDIATORS.** Each LOB and staff office may be requested to nominate individuals to participate in the program. The EEO ADR PM may select from among individuals nominated to serve as mediators.

**3-3. MEDIATOR SKILLS AND ABILITIES.**

a. FAA EEO mediators must possess the following skills and abilities<sup>1</sup>:

(1) **Gathering information.** Effectiveness in identifying and seeking out relevant information pertinent to the case.

(2) **Empathy.** Conspicuous awareness and consideration of the needs of others.

(3) **Impartiality.** Maintaining equal respect for all parties, remaining neutral, and keeping an open mind.

(4) **Generating options.** Pursuit of collaborative solutions and generation of ideas and proposals consistent with case facts and workable for opposing parties.

(5) **Generating agreements.** Effectiveness in moving the parties toward finality and in "closing" an agreement.

(6) **Managing the interaction.** Effectiveness in developing strategy, managing the process, coping with conflicts between parties and representatives.

b. Region and center Civil Rights Staffs may develop the process by which mediator competencies are measured, but it must be coordinated with the Assistant Administrator for Civil Rights in advance.

**3-4. MEDIATOR STANDARDS OF CONDUCT.** FAA EEO mediators will adhere to the Model Standards of Conduct for Mediators (appendix 4) jointly published by the American Arbitration Association, the American Bar Association, and the Society of Professionals in Dispute Resolution.

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<sup>1</sup>The Test Design Project. Performance-Based Assessment: A Methodology for use in Selecting, Training, and Evaluating Mediators. (Washington, DC: National Institute for Dispute Resolution, 1995)

**3-5. FUNDING MEDIATOR TRAINING.** Each LOB and staff office will contribute a proportionate dollar amount, based on its percentage of employees to fund mediation training. The training of mediators may be conducted by an outside organization (e.g., the Federal Mediation and Conciliation Service, the Department of Health and Human Services ADR Team, or other qualified sources as approved by the DDRS).

**3-6. BASIC TRAINING REQUIREMENTS.**

**a. Classroom Training.** FAA EEO Mediators will be required to complete successfully 40 hours of formal classroom training to acquire basic mediation skills. Training will be provided by sources approved by the DDRS. The training shall, at a minimum, consist of:

(1) **Basic Skills.** Instruction in basic mediation skills, consisting of 24 hours of mediation process, mediator roles, conflict theory, resolution theory, mediator ethics, and role-playing exercises. (3 days)

(2) **Role Play.** Participation in 1 day of evaluated role-plays simulating possible mediation scenarios. (1 day)

(3) **Observation.** Observation of at least one complete mediation conducted by a senior mediator or observation of a mock mediation conducted by an experienced mediator/trainer. (1/2 day)

(4) **EEO.** Instruction about the Federal sector EEO process. (1/2 day)

**b. On-the-Job Training.** FAA EEO mediators will participate in at least three supervised co-mediations of EEO cases. By the third co-mediation, the developmental mediator should conduct as much of the mediation as possible under the supervision of a senior mediator.

**3-7. MEDIATOR FULL-PERFORMANCE-LEVEL.** New mediators will be required to co-mediate with a senior mediator before mediating on their own. Eligibility to mediate EEO cases individually will be determined by the Office of Civil Rights or region or center Civil Rights Staff in accordance with any applicable departmental and agency directives.

**3-8. CURRENCY TRAINING.** To maintain their skill, mediators will be required to take an advanced or refresher mediation course, which includes role-playing exercises each year. The EEO ADR PM Mediator will periodically review mediator performance. Additional training may be recommended to improve performance, if necessary.



**3-9. ORGANIZATIONAL CONFLICT OF INTEREST.** To avoid the appearance of an organizational conflict of interest, FAA Civil Rights Officers and their staffs will not mediate or co-mediate cases within their jurisdiction.

**3-10. ROSTER OF ELIGIBLE MEDIATORS.** The EEO ADR PM will maintain a roster of eligible mediators who are appropriately trained and possess the skills necessary to conduct mediations (i.e., successful completion of mediation training and deemed suitable to conduct mediation by the Office of Civil Rights or region or center Civil Rights Staff).

**3-11. REMOVAL.** An FAA or outside (non-FAA) mediator found to have engaged in conduct that reflects adversely on his/her impartiality or on the performance of his/her duties as a mediator may be removed from the list of eligible EEO mediators. The determination to remove a mediator will be made by the Office of Civil Rights or region or center Civil Rights Staff in accordance with the Model Standards of Conduct for Mediators (appendix 4) and any applicable departmental and agency directives.

## CHAPTER 4. OTHER MEDIATORS

**4-1. FEDERAL EXECUTIVE BOARD PROGRAMS.** In 1961, President Kennedy established Federal Executive Boards (FEB) to increase the effectiveness and economy of Federal agencies located outside Washington, D.C. The 28 current FEB's have a number of initiatives in place to meet those goals, including ADR programs. FAA region and center Civil Rights Staffs are encouraged to join with other local Federal agencies to participate in FEB mediation programs. These programs share mediators among Federal agencies close to one another.

**4-2. SHARED AGENCY NEUTRALS.** In Washington, D.C., the equivalent of FEB mediation programs is the Federal Interagency Sharing of Neutrals Project, administered by the Department of Health and Human Services. Washington headquarters may participate in the Sharing Agency Neutrals program.

**4-3. CONTRACTOR MEDIATORS.** A number of companies provide mediation services for a fee. To the extent that no FAA or other Government mediators are available, or where the EEO ADR PM determines it to be otherwise appropriate, contractor mediators may be used to conduct mediations. Funding for non-Government mediation will be coordinated with the paying affected office in advance.

**4-4. NON-FAA MEDIATOR QUALIFICATIONS.** For non-FAA mediators to mediate FAA EEO cases, they must be certified in accordance with the standards established by the state where they practice or must be approved by the DDRS before conducting mediations.

**4-5. STANDARDS OF CONDUCT.** Non-FAA mediators shall adhere to the Model Standards of Conduct for Mediators (appendix 4) jointly published by the American Arbitration Association, the American Bar Association, and the Society of Professionals in Dispute Resolution.

**FEDERAL AVIATION ADMINISTRATION  
EQUAL EMPLOYMENT OPPORTUNITY  
ALTERNATIVE DISPUTE RESOLUTION**

**AGREEMENT TO MEDIATE**

**Designation of the Parties and Issues:**

The following are to be filled in by the EEO counselor: designation of the aggrieved person, the office against which the allegations are made, and the alleged discriminatory issues.

This agreement is between

\_\_\_\_\_  
(Aggrieved Person)

and

\_\_\_\_\_  
(Affected FAA Office)

represented by

\_\_\_\_\_  
(Agency official)

The parties agree to enter into mediation with the intent of reaching a mutually agreeable resolution of the dispute regarding (separately list each allegation of discrimination that is part of the dispute and the include complaint number, if one has been assigned, otherwise list the date of initial contact with the EEO Counselor). Issues may be listed on a separate sheet of paper and attached.

**Designation of Representative:**

*The aggrieved person designates her/his representative, if she/he desires a representative, for this mediation process.*

\_\_\_\_\_  
(employee's representative's name)

\_\_\_\_\_  
(phone number)

is hereby designated by the aggrieved person as her/his representative for the purpose of this mediation.

**Confidentiality Clause for Representatives:**

We, the undersigned, agree not to disclose confidential information, unless: (1) all parties agree in writing to disclose the information; (2) the information has already been made public; (3) the disclosure of the information is required by law; or (4) a court determines that disclosure of the information is necessary.

Employee Representative    Date    Agency Representative    Date

**Provisions of the Agreement and Signatures:**

1. The parties agree that the pre-complaint process is extended by 60 calendar days. The total EEO counseling period may not exceed 90 calendar days from the date EEO counseling began.
2. Mediators are neutral third parties who will assist the parties to reach a mutually satisfactory resolution of the dispute. Mediators will not make judgments or impose a resolution.
3. Mediators do not offer advice or provide legal counsel.
4. The parties have a right to have a representative of their choice accompany and advise them at anytime during the mediation process.
5. The confidentiality of the mediation process is established in the Administrative Dispute Resolution Act of 1996. A "plain English" summary of these confidentiality provisions is on the reverse side of this form and is a part of this agreement.
6. While the parties intend to continue with mediation until a resolution is reached, it is understood that either or both parties may withdraw from mediation at any time. It is agreed that if one or both parties decide to withdraw from mediation, the parties will discuss their decision in the presence of both parties and the mediator(s).
7. If the mediator(s) determines that it is not possible to resolve the dispute through mediation, the mediator can terminate the process once it has been communicated to the parties.
8. If agreement is reached, the mediator(s) will prepare a resolution agreement with the parties for their signature.
9. If a resolution agreement is achieved, the aggrieved person agrees that the allegations/issues that formed a basis of the dispute will thereby be withdrawn, will no longer serve as the basis of a complaint against the agency or its agents, and will not serve as a basis for a future complaint.
10. If there is no resolution, the aggrieved person will be referred back to the EEO Counselor to complete the pre-complaint process.

The parties have read, understand, and agree to the provisions of this agreement.

Aggrieved Person    Date    Agency Official    Date

Mediator    Date    Mediator    Date

12/13/99

Appendix 1, Format 1  
1400.10

**FEDERAL AVIATION ADMINISTRATION  
EQUAL EMPLOYMENT OPPORTUNITY  
ALTERNATIVE DISPUTE RESOLUTION**

**CONFIDENTIALITY PROVISIONS  
PLAIN ENGLISH SUMMARY**

The Administrative Dispute Resolution Act of 1996 (ADRA) provides for the confidentiality of the mediation process as follows:

**a. Mediator.** A mediator may not disclose confidential information, unless:

- (1) all parties agree in writing to disclose the information;
- (2) the information has already been made public;
- (3) the disclosure of the information is required by law; or
- (4) a court determines that disclosure of the information is necessary to:
  - (a) prevent manifest injustice;
  - (b) help establish violation of a law; or
  - (c) prevent serious harm to public health or safety.

**b. Parties.** A party to the mediation may not disclose confidential information, unless:

- (1) the party prepared the information;
- (2) all parties agree in writing to disclose of the information;
- (3) the information has already been made public;
- (4) the disclosure of the information is required by law;
- (5) a court determines that disclosure of the information is necessary to:
  - (a) prevent manifest injustice;
  - (b) help establish violation of a law; or
  - (c) prevent serious harm to public health or safety;
- (6) the disclosure of the information is relevant to finding, understanding, or enforcing a resolution agreement resulting from mediation; or
- (7) except for information communicated by the mediator, the information was provided to, or available, to all parties.

**c. Violations.** Any confidential information disclosed in violation of the ADRA and this agreement shall not be admissible in any administrative (e.g. EEOC hearing) or judicial (e.g., suit in the U.S. District Court) proceeding related to the issues raised in mediation.

**d. Alternative Confidentiality Agreement.** The parties may agree to use different procedures for disclosure of confidential information by the mediator. In order to use different procedures, the parties must make changes to section "a," initial the changes, and inform the mediator of the changes before the mediation begins. Unless the parties inform the mediator of a different set of procedures, section "a" will apply.

**e. Discovery in a Judicial Proceeding.** If the mediator is asked to disclose confidential information communicated during the mediation process as part of a judicial proceeding, the mediator will make reasonable efforts to notify the parties (and/or affected nonparty participant) of the request. The parties (and/or affected nonparty participant) have 15 calendar days to respond to the mediator and offer to defend the mediator's refusal to disclose the confidential information. If the parties (and/or affected nonparty participant) do not reply to the mediator within 15 calendar days, they have waived their rights to object to disclosure of confidential information by the mediator.

**f. Otherwise Discoverable Information.** Information communicated in mediation is not protected from disclosure if it is otherwise discoverable.

**g. Performing a Resolution Agreement.** Sections "a" and "b" will not apply where necessary to comply with a resolution agreement reached as a result of mediation or to document compliance with such agreement.

**h. Research.** Information about mediation may be gathered for research or educational purposes so long as the parties and specific issues mediated are not identifiable.

**i. Dispute with the Mediator.** Sections "a" and "b" do not prevent the use of an alternative dispute resolution process to resolve a dispute with the mediator provided that release of confidential information is only released to the extent necessary to resolve the conflict with the mediator.



**FEDERAL AVIATION ADMINISTRATION  
OFFICE OF CIVIL RIGHTS  
ALTERNATIVE DISPUTE RESOLUTION  
*RESOLUTION AGREEMENT***

**INSTRUCTIONS**

Mediator fills in the names of the aggrieved person, affected office, and agency official. Mediator copies the dispute from the Agreement to Mediate form and all terms of the agreement.

If terms in the draft agreement require action by persons not present at the mediation (e.g., Human Resources Management or the Office of the Chief Counsel), the EEO ADR PM shall coordinate with the appropriate persons in those offices prior to signing the agreement.

The parties sign the Resolution Agreement after appropriate coordination.

This agreement is between

-----  
(Aggrieved person)

and

-----  
(Affected FAA Office)

represented by

-----  
(Agency official)

with regard to the following matter, hereinafter called "dispute." Separately list each allegation of discrimination that is part of the dispute, include complaint number, if one has been assigned, otherwise the date of initial contact with the EEO Counselor.

In full and complete resolution of the dispute, the undersigned parties stipulate and agree as follows:

1. In exchange for the promises made by the Federal Aviation Administration (hereinafter "agency" or "FAA") in paragraph 2 of this agreement:

a. The aggrieved person hereby withdraws with prejudice and agrees not to pursue in any forum the allegations described in the Dispute, which were resolved and which formed the basis of the dispute.

b. Except as to enforcement proceedings under Paragraph 7 of this agreement, the aggrieved person agrees to waive any and all claims against the United States, its agencies and departments, and its officers and employees in their official and individual capacities which have arisen or may arise out of the subject matter of the Dispute.

(insert any other agreements/promises of action made by the aggrieved person; identify them as "c.," "d.," "e.," etc.)

2. In exchange for the promises of the aggrieved person contained in paragraph 1 of this agreement, the agency agrees that:

a. No reprisal action will be taken against aggrieved person.

(insert any other agreements/promises of action made by the aggrieved person; identify them as "c.," "d.," "e.," etc.)

3. This agreement represents the full and complete resolution of all outstanding allegations brought by the aggrieved person, on his/her behalf, all actual or potential claims arising from the dispute, as well as any claims that might be filed with regard to the execution and implementation of this resolution, except to enforce the agreement as set forth in paragraph 7.

4. This agreement is reached without final judgment as to the merits of the complaint and shall in no way constitute an admission of liability, wrongdoing, or discrimination by the agency, its managers, supervisors, or aggrieved person.

5. This agreement is non-precedential and may not be cited in any other proceeding or in any forum.

6. The parties agree that they shall keep the terms and facts of this Resolution Agreement confidential in accordance with 5 U.S.C. 570 et. seq. except as otherwise required by law, and shall neither disclose nor discuss its contents with any third party, except those persons necessary to carry out the terms or resolve disputes over compliance of this Resolution Agreement.

7. If the aggrieved person believes that the FAA has failed to comply with the terms of the resolution agreement, he/she shall notify:

Department of Transportation  
Departmental Office of Civil Rights  
Compliance Operations Division (S-34)  
400 Seventh Street, SW.  
Washington, DC 20590

Such notice must be in writing and submitted within 30 days of the date when he/she knew, or should have known, of the alleged noncompliance. In accordance with 29 C.F.R., Section 1614.504, the aggrieved person may request that the terms of the resolution agreement be specifically implemented, or alternatively, that the allegation(s) be reinstated for further action from the point the complaint processing ceased. In the event the complaining party alleges noncompliance and chooses to reinstate his/her allegations of discrimination, he/she hereby acknowledges that his/her request for reinstatement restores the status quo, requiring that he/she return in full to the agency any relief that has been provided.

If the agency has not responded to the complainant or if the aggrieved person is not satisfied with the agency's attempt to resolve the matter, he/she may appeal to the EEOC, Office of Federal Operations, for a determination as to whether the agency has complied with the terms of the settlement agreement. The aggrieved person may file such an appeal 35 days after he or she has served the agency with the allegations of noncompliance, but must file an appeal within 30 days of his or her receipt of the agency's determination. The aggrieved person must serve a copy of the appeal on the agency, and the agency may submit a response to the Commission within 30 days of receiving notice of the appeal.

8. The parties attest that they have read and understand the provisions of this Resolution Agreement and that their signatures are voluntary and were in no way coerced by any party or the representative of any party.

9. By entering into this agreement, the aggrieved person and the agency acknowledge that this agreement is the result of mediated discussions consisting of mutual considerations and contains the complete and entire agreement by which the parties are bound.

10. No modification or waiver or any of the terms of this agreement shall be valid unless in writing executed by the parties in dispute and, where applicable, their advisors.

*OLDER WORKERS BENEFIT PROTECTION ACT NOTICE*

If the dispute involves allegations of discrimination under the Age Discrimination in Employment Act (ADEA), the aggrieved person waives any rights or claims under the ADEA.

This resolution agreement shall not become effective or enforceable for a period of seven (7) days following the date that it is signed by both parties, during which time the aggrieved person has the right to revoke this agreement.

Approved by:

\_\_\_\_\_  
(Approving Offices  
as necessary)

\_\_\_\_\_  
Date

\_\_\_\_\_  
(Approving Offices  
as necessary)

\_\_\_\_\_  
Date

-----  
Aggrieved Person

-----  
Date

-----  
Agency official

-----  
Date

-----  
Employee Representative

-----  
Date



## APPENDIX 2. RELATED PUBLICATIONS

### 1. STATUTES.

(1) The Civil Rights Act of 1964, as amended, prohibits discrimination in employment on the basis of race, color, religion, sex (gender), national origin, or reprisal.

(2) The Age Discrimination in Employment Act of 1967 prohibits discrimination in employment based on age when the employee is at least 40 years old.

(3) The Equal Pay Act prohibits discrimination in payment of wages based on sex (gender).

(4) The Rehabilitation Act of 1973 prohibits discrimination in employment on the basis of physical or mental handicap.

(5) The Administrative Dispute Resolution Act of 1996 (Public Law 104-320) reauthorizes Federal agencies to utilize dispute resolution to resolve an issue in controversy that relates to an administrative program, if the parties agree to such proceeding.

(6) Title 5 of the United States Code, Chapter 5, Subchapter IV, Alternative Means of Dispute Resolution In The Administrative Process, as amended, describes the ADR process and defines its components. (see appendix 3)

(7) The 49 U.S.C. 102, Department of Transportation, (Presidential Appointees) describes the organization of the positions filled by persons appointed by the President.

### 2. REGULATIONS.

(1) 29 Code of Federal Regulations (CFR) Part 1614, Federal Sector Equal Employment Opportunity governs processing complaints of Federal employment discrimination.

(2) 49 CFR 1.23(a), Subtitle A - Office of the Secretary of Transportation Spheres of Primary Responsibility for the Secretary and Deputy Secretary includes the overall planning, direction, and control of departmental affairs including civil rights, contract appeals, small and disadvantaged business participation in departmental programs, etc.

### 3. EXECUTIVE ORDERS.

Executive Order 11478, Equal Employment Opportunity in the Federal Government, as amended, prohibits discrimination in Federal employment because of race, color, religion, sex, national origin, handicap, age, or sexual orientation.

#### **4. MANAGEMENT DIRECTIVES.**

Equal Employment Opportunity Commission Equal Employment Opportunity Management Directive (MD) 110, Federal Sector Complaints Processing Manual provides guidance on processing complaints of Federal employment discrimination.

#### **5. DEPARTMENTAL ORDERS.**

Order DOT 2101.1, Use of Alternative Dispute Resolution (ADR) Methods, sets policy for the use of ADR in the Department, further defines the role and responsibilities of agency dispute resolution specialists, and establishes an ADR working group within the Department.

**APPENDIX 3. TITLE 5, U.S.C., CHAPTER 5, SUBCHAPTER IV,  
ALTERNATIVE MEANS OF DISPUTE RESOLUTION IN THE  
ADMINISTRATIVE PROCESS**

**§ 571. Definitions**

For the purposes of this subchapter, the term-

- (1) "agency" has the same meaning as in section 551(l) of this title;
- (2) "administrative program" includes a Federal function which involves protection of the public interest and the determination of rights, privileges, and obligations of private persons through rule making, adjudication, licensing, or investigation, as those terms are used in subchapter II of this chapter,
- (3) "alternative means of dispute resolution" means any procedure that is used to resolve issues in controversy, including, but not limited to, conciliation, facilitation, mediation, fact-finding, mini-trials, arbitration, and use of ombuds, or any combination thereof,
- (4) "award" means any decision by an arbitrator resolving the issues in controversy;
- (5) "dispute resolution communication" means any oral or written communication prepared for the purposes of a dispute resolution proceeding, including any memoranda, notes or work product of the neutral, parties or nonparty participant; except that a written agreement to enter into a dispute resolution proceeding, or final written agreement or arbitral award reached as a result of a dispute resolution proceeding, is not a dispute resolution communication;
- (6) "dispute resolution proceeding" means any process in which an alternative means of dispute resolution is used to re-solve an issue in controversy in which a neutral is appointed and specified parties participate;
- (7) "in confidence" means, with respect to information, that the information is provided-
  - (A) with the expressed intent of the source that it not be disclosed; or
  - (B) under circumstances that would create the reasonable expectation on behalf of the source that the information will not be disclosed;
- (8) "issue in controversy" means an issue which is material to a decision concerning an administrative program of an agency, and with which there is disagreement-

(A) between an agency and persons who would be substantially affected by the decision; or

(B) between persons who would be substantially affected by the decision;

(9) "neutral" means an individual who, with respect to an issue in controversy, functions specifically to aid the parties in resolving the controversy;

(10) "party" means-

(A) for a proceeding with named parties, the same as in section 551(3) of this title; and

(B) for a proceeding without named parties, a person who will be significantly affected by the decision in the proceeding and who participates in the proceeding;

(11) "person" has the same meaning as in section 551-(2) of this title; and

(12) "roster" means a list of persons qualified to provide services as neutrals.

#### **§ 572. General authority**

(a) An agency may use a dispute resolution proceeding for the resolution of an issue in controversy that relates to an administrative program, if the parties agree to such proceeding.

(b) An agency shall consider not using a dispute resolution proceeding if-

(1) a definitive or authoritative resolution of the matter is required for precedential value, and such a proceeding is not likely to be accepted generally as an authoritative precedent;

(2) the matter involves or may bear upon significant questions of Government policy that require additional procedures before a final resolution may be made, and such a proceeding would not likely serve to develop a recommended policy for the agency;

(3) maintaining established policies is of special importance, so that variations among individual decisions are not increased and such a proceeding would not likely reach consistent results among individual decisions;

(4) the matter significantly affects persons or organizations who are not parties to the proceeding-,

(5) a full public record of the proceeding is important, and a dispute resolution proceeding cannot provide such a record; and

(6) the agency must maintain continuing jurisdiction over the matter with authority to alter the disposition of the matter in the light of changed circumstances, and a dispute resolution proceeding would interfere with the agency's fulfilling that requirement.

(c) Alternative means of dispute resolution authorized under this subchapter are voluntary procedures which supplement rather than limit other available agency dispute resolution techniques.

### **§ 573. Neutrals**

(a) A neutral may be a permanent or temporary officer or employee of the Federal Government or any other individual who is acceptable to the parties to a dispute resolution proceeding. A neutral shall have no official, financial, or personal conflict of interest with respect to the issues in controversy, unless such interest is fully disclosed in writing to all parties and all parties agree that the neutral may serve.

(b) A neutral who serves as a conciliator, facilitator, or mediator serves at the will of the parties.

(c) The President shall designate an agency or designate or establish an interagency committee to facilitate and encourage agency use of dispute resolution under this subchapter. Such agency or interagency committee, in consultation with other appropriate Federal agencies and professional organizations experienced in matters concerning dispute resolution, shall-

(1) encourage and facilitate agency use of alternative means of dispute resolution; and

(2) develop procedures that permit agencies to obtain the services of neutrals on an expedited basis.

(d) An agency may use the services of one or more employees of other agencies to serve as neutrals in dispute resolution proceedings. The agencies may enter into an interagency agreement that provides for the reimbursement by the user agency or the parties of the full or partial cost of the services of such an employee.

(e) Any agency may enter into a contract with any person for services as a neutral, or for training in connection with alternative means of dispute resolution. The parties in a dispute resolution proceeding shall agree on compensation for the neutral that is fair and reasonable to the Government.

**§ 574. Confidentiality**

(a) Except as provided in subsections (d) and (e), a neutral in a dispute resolution proceeding shall not voluntarily disclose or through discovery or compulsory process be required to disclose any dispute resolution communication or any communication provided in confidence to the neutral, unless-

(1) all parties to the dispute resolution proceeding and the neutral consent in writing, and, if the dispute resolution communication was provided by a nonparty participant, that participant also consents in writing;

(2) the dispute resolution communication has already been made public;

(3) the dispute resolution communication is required by statute to be made public, but a neutral should make such communication public only if no other person is reasonably available to disclose the communication; or

(4) a court determines that such testimony or disclosure is necessary to-

(A) prevent a manifest injustice;

(B) help establish a violation of law; or

(C) prevent harm to the public health or safety, of sufficient magnitude in the particular case to outweigh the integrity of dispute resolution proceedings in general by reducing the confidence of parties in future cases that their communications will remain confidential.

(b) A party to a dispute resolution proceeding shall not voluntarily disclose or through discovery or compulsory process be required to disclose any dispute resolution communications unless-

(1) the communication was prepared by the party seeking disclosure;

(2) all parties to the dispute resolution proceeding consent in writing;

(3) the dispute resolution communication has already been made public;

(4) the dispute resolution communication is required by statute to be made public;

(5) a court determines that such testimony or disclosure is necessary to-

(A) prevent a manifest injustice;

(B) help establish a violation of law; or

(C) prevent harm to the public health and safety, of sufficient magnitude in the particular case to outweigh the integrity of dispute resolution proceedings in general by reducing the confidence of parties in future cases that their

communications will remain confidential;

(6) the dispute resolution communication is relevant to determining the existence or meaning of an agreement or award that resulted from the dispute resolution communication or to the enforcement of such an agreement or award; or

(7) except for dispute resolution communications generated by the neutral, the dispute resolution communication was provided to or was available to all parties to the dispute resolution proceeding.

(c) Any dispute resolution communication that is disclosed in violation of subsection (a) or (b), shall not be admissible in any proceeding relating to the issues in controversy with respect to which the communication was made.

(d) (1) The parties may agree to alternative confidential procedures for disclosures by a neutral. Upon such agreement the parties shall inform the neutral before the commencement of the dispute resolution proceeding of any modifications to the provisions of subsection (a) that will govern the confidentiality of the dispute resolution proceeding. If the parties do not so inform the neutral, subsection (a) shall apply.

(2) To qualify for the exemption established under subsection (j), an alternative confidential procedure under this subsection may not provide for less disclosure than the confidential procedures otherwise provided under this section.

(e) If a demand for disclosure, by way of discovery request or other legal process, is made upon a neutral regarding a dispute resolution communication, the neutral shall make reasonable efforts to notify the parties and any affected nonparty participants of the demand. Any party or affected nonparty participant who receives such notice and within 15 calendar days does not offer to defend a refusal of the neutral to disclose the requested information shall have waived any objection to such disclosure.

(f) Nothing in this section shall prevent the discovery or admissibility of any evidence that is otherwise discoverable, merely because the evidence was presented in the course of a dispute resolution proceeding.

(g) Subsections (a) and (b) shall have no effect on the information and data that are necessary to document an agreement reached or order issued pursuant to a dispute resolution proceeding.

(h) Subsections (a) and (b) shall not prevent the gathering of information for research or educational purposes, in cooperation with other agencies, governmental entities, or dispute resolution programs, so long as the parties and the specific issues in controversy are not identifiable.

(i) Subsections (a) and (b) shall not prevent use of a dispute resolution communication to resolve a dispute between the neutral in a dispute resolution proceeding and a party to or participant in such proceeding so long as such dispute resolution communication is disclosed only to the extent necessary to resolve such dispute.

(j) A dispute resolution communication which is between a neutral and a party and which may not be disclosed under this section shall also be exempt from disclosure under section 552(b)(3).



## APPENDIX 4. MODEL STANDARDS OF CONDUCT FOR MEDIATORS<sup>1</sup>

**Introductory Note.** *The initiative for these standards came from three professional groups: The American Arbitration Association, the American Bar Association, and the Society of Professionals in Dispute Resolution.*

*The purpose of this initiative was to develop a set of standards to serve as a general framework for the practice of mediation. The effort is a step in the development of the field and a tool to assist practitioners in it—a beginning, not an end. The model standards are intended to apply to all types of mediation. It is recognized, however, that in some cases the application of these standards may be affected by laws or contractual agreements.*

**Preface.** The model standards of conduct for mediators are intended to perform three major functions: to serve as a guide for the conduct of mediators; to inform the mediating parties; and to promote public confidence in mediation as a process for resolving disputes. The standards draw on existing codes of conduct for mediators and take into account issues and problems that have surfaced in mediation practice. They are offered in the hope that they will serve an educational function and provide assistance to individuals, organizations, and institutions involved in mediation.

### **I. Self-Determination: A Mediator shall Recognize that Mediation is Based on the Principle of Self-Determination by the Parties.**

Self-determination is the fundamental principle of mediation. It requires that the mediation process rely upon the ability of the parties to reach a voluntary, un-coerced agreement. Any party may withdraw from mediation at any time.

#### **Comments:**

- The mediator may provide information about the process, raise issues, and help parties explore options. The primary role of the mediator is to facilitate a voluntary resolution of a dispute. Parties shall be given the opportunity to consider all proposed options.
- A mediator cannot personally ensure that each party has made a fully informed choice to reach a particular agreement, but is a good practice for the mediator to make the parties aware of the importance of consulting other professionals, where appropriate, to help them make informed decisions.

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<sup>1</sup> The Model Standards of Conduct for Mediators were prepared from 1992 through 1994 by a joint committee composed of two delegates from the American Arbitration Association, John D. Feerick, Chair, and David Botwinik, two from the American Bar Association, James Alfini and Nancy Rogers, and two from the Society of Professionals in Dispute Resolution, Susan Dearborn and Lemoine Pierce.

The Model Standards have been approved by the American Arbitration Association, the Litigation Section and the Dispute Resolution Section of the American Bar Association, and the Society of Professionals in Dispute Resolution.

Reporters: Bryant Garth and Kimberlee K. Kovach

Staff Project Director: Frederick E. Woods

The views set out in this publication have not been considered by the American Bar Association House of Delegates and do not constitute the policy of the American Bar Association.

## **II. Impartiality: A Mediator shall Conduct the Mediation in an Impartial Manner.**

The concept of mediator impartiality is central to the mediation process. A mediator shall mediate only those matters in which she or he can remain impartial and evenhanded. If at any time the mediator is unable to conduct the process in an impartial manner, the mediator is obligated to withdraw.

### **Comments:**

- A mediator shall avoid conduct that gives the appearance of partiality toward one of the parties. The quality of the mediation process is enhanced when the parties have confidence in the impartiality of the mediator.
- When mediators are appointed by a court or institution, the appointing agency shall make reasonable efforts to ensure that mediators serve impartially.
- A mediator should guard against partiality or prejudice based on the parties' personal characteristics, background or performance at the mediation.

## **III. Conflicts of Interest: A Mediator shall Disclose all Actual and Potential Conflicts of Interest Reasonably Known to the Mediator. After Disclosure, the Mediator shall Decline to Mediate unless all Parties Choose to Retain the Mediator. The Need to Protect Against Conflicts of Interest also Governs Conduct that Occurs During and After the Mediation.**

A conflict of interest is a dealing or relationship that might create an impression of possible bias. The basic approach to questions of conflict of interest is consistent with the concept of self-determination. The mediator has a responsibility to disclose all actual and potential conflicts that are reasonably known to the mediator and could reasonably be seen as raising a question about impartiality. If all parties agree to mediate after being informed of conflicts, the mediator may proceed with the mediation. If, however, the conflict of interest casts serious doubt on the integrity of the process, the mediator shall decline to proceed.

A mediator must avoid the appearance of 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 a related matter, or in an unrelated matter under circumstances which would raise legitimate questions about the integrity of the mediation process.

### **Comments:**

- A mediator shall avoid conflicts of interest in recommending the services of other professionals. A mediator may make reference to professional referral services or associations which maintain rosters of qualified professionals.
- Potential conflicts of interest may arise between administrators of mediation programs and mediators and there may be strong pressures on the mediator to

settle a particular case or cases. The mediator's commitment must be to the parties and the process. Pressure from outside of the mediation process should never influence the mediator to coerce parties to settle.

**IV. Competence: A Mediator shall Mediate Only When the Mediator has the Necessary Qualifications to Satisfy the Reasonable Expectations of the Parties.**

Any person may be selected as a mediator, provided that the parties are satisfied with the mediator's qualifications. Training and experience in mediation, however, are often necessary for effective mediation. A person who offers herself or himself as available to serve as a mediator gives parties and the public the expectation that she or he has the competency to mediate effectively. In court-connected or other forms of mandated mediation, it is essential that mediators assigned to the parties have the requisite training and experience.

**Comments:**

- Mediators should have information available for the parties regarding their relevant training, education and experience.
- The requirements for appearing on the list of mediators must be made public and available to interested persons.
- When mediators are appointed by a court or institution, the appointing agency shall make reasonable efforts to ensure that each mediator is qualified for the particular mediation.

**V. Confidentiality: A Mediator shall Maintain the Reasonable Expectations of the Parties with Regard to Confidentiality.**

The reasonable expectations of the parties with regard to confidentiality shall be met by the mediator. The parties' expectations of confidentiality depend on the circumstances of the mediation and any agreements they may make. The mediator shall not disclose any matter that a party expects to be confidential unless given permission by all parties or unless required by law or other public policy.

**Comments:**

- The parties may make their own rules with respect to confidentiality, or other accepted practice of an individual mediator or institution may dictate a particular set of expectations. Since the parties' expectations regarding confidentiality are important, the mediator should discuss these expectations with the parties.
- If the mediator holds private sessions with a party, the nature of these sessions with regard to confidentiality should be discussed prior to undertaking such sessions.

## Appendix 4

- In order to protect the integrity of the mediation, a mediator should avoid communicating information about how the parties acted in the mediation process, the merits of the case, or settlement offers. The mediator may report, if required, whether parties appeared at a scheduled mediation.
- Where the parties have agreed that all or a portion of the information disclosed during a mediation is confidential, the parties' agreement should be respected by the mediator.
- Confidentiality should not be construed to limit or prohibit the effective monitoring, research, or evaluation of mediation programs by responsible persons. Under appropriate circumstances, researchers may be permitted to obtain access to the statistical data and, with the permission of the parties, to individual case files, observations of live mediations, and interviews with participants.

**VI. Quality of the Process: A Mediator shall Conduct the Mediation Fairly, Diligently, and in a Manner Consistent with the Principle of Self-Determination by the Parties.**

A mediator shall work to ensure a quality process and to encourage mutual respect among the parties. A quality process requires a commitment by the mediator to diligence and procedural fairness. There should be adequate opportunity for each party in the mediation to participate in the discussions. The parties decide when and under what conditions they will reach an agreement or terminate a mediation.

**Comments:**

- A mediator may agree to mediate only when he or she is prepared to commit the attention essential to an effective mediation.
- Mediators should only accept cases when they can satisfy the reasonable expectations of the parties concerning the timing of the process. A mediator should not allow a mediation to be unduly delayed by the parties or their representatives.
- 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 the entire mediation process.
- The primary purpose of a mediator is to facilitate the parties' voluntary agreement. This role differs substantially from other professional-client relationships. Mixing the role of a mediator and the role of a professional advising a client is problematic, and mediators must strive to distinguish between the roles. A mediator should, therefore, refrain from providing professional advice. Where appropriate, a mediator should recommend that parties seek outside professional advice, or consider resolving their dispute through arbitration, counseling, neutral evaluation, or other processes. A mediator who undertakes, at the request of the

parties, an additional dispute resolution role in the same matter assumes increased responsibilities and obligations that may be governed by the standards of other processes.

- A mediator shall withdraw from a mediation when incapable of serving or when unable to remain impartial.
- A mediator shall withdraw from a mediation or postpone a session if the mediation is being used to further illegal conduct, or if a party is unable to participate due to drug, alcohol, or other physical or mental incapacity.
- Mediators should not permit their behavior in the mediation process to be guided by a desire for a high settlement rate.

**VII. Reserved.**

**VIII. Reserved.**

**IX. Obligations to the Mediation Process: Mediators have a Duty to Improve the Practice of Mediation.**

**Comment:**

- Mediators are regarded as knowledgeable in the process of mediation. They have an obligation to use their knowledge to help educate the public about mediation; to make mediation accessible to those who would like to use it; to correct abuses; and to improve their professional skills and abilities.

Copies of the Model Standards of Conduct for Mediators are available from the offices of the participating organizations. The addresses are listed below.

American Bar Association  
Section on Dispute Resolution  
740-15<sup>th</sup> Street Northwest  
Washington, DC 20005-1009  
(202) 622-1681

Society of Professionals in Dispute Resolution  
815-15<sup>th</sup> Street Northwest  
Washington, DC 20005  
(202) 783-7277

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