

# Ethics

For Mediators and Peacemakers

# What are Ethics?

- Ethics concerns the idea of what is right and wrong.
- Ethics concerns values and attitudes
- Ethics are embodied in principles or rules of conduct.

# Why Have Ethics?

- Ethics are understood in terms of intrinsic value or instrumental value.
- Intrinsic value is the independent value ascribed to acting ethically
- Instrumental value is summarized by the cliché "it pays to be ethical."
- Ethics satisfy the demands of consciences
- Ethics affect client demand for services.

# Mediation Ethics

- Dictate appropriate mediator behaviors
- Establish moral guidelines
- Define minimally acceptable standards of conduct.
- Clarify issues, reduce uncertainty, and constrain individual mediator behavior.

# Ethics Unify

- Provide a common vocabulary
- Express shared beliefs for both the practitioners and the general public.
- Promote public awareness of the field or profession.
- Reassure the general public that practitioners are responsible and accountable.

# Sources of Ethical Standards

- SPIDR-ABA-AAA Model Standards
- California Dispute Resolution Council
- CPR-Georgetown Model Rule 4.5
- Other Professional Ethics

# SPIDR-ABA-AAA Standards

## Standard I

Self-Determination: A mediator shall recognize that mediation is based on the principle of self-determination by the parties.

# SPIDR-ABA-AAA Standards

## Standard II

Impartiality: A mediator shall conduct the mediation in an impartial manner.

# SPIDR-ABA-AAA Standards

## Standard 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.

# SPIDR-ABA-AAA Standards

## Standard IV

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

# SPIDR-ABA-AAA Standards

## Standard V

Confidentiality: A mediator shall maintain the reasonable expectations of the parties with regard to confidentiality.

# SPIDR-ABA-AAA Standards

## Standard VI

Quality of the Process: A mediator shall conduct the mediation fairly, diligently, and in a manner consistent with the principles of self-determination by the parties.

# SPIDR-ABA-AAA Standards

## Standard VII

Advertising and Soliciting: A mediator shall be truthful in advertising and soliciting for mediation.

# SPIDR-ABA-AAA Standards

## Standard VIII

Fees: A mediator shall fully disclose and explain the basis of compensation, fees, and charges to the parties.

# SPIDR-ABA-AAA Standards

## Standard IX

Obligation to the Mediation Process: Mediators have a duty to improve the practice of mediation

# Ethical Challenges

## Standard I-Self-Determination

- What is the duty to describe process?
- What is the propriety of evaluative mediation?
- What is the duty to advise parties they may withdraw at any time?

# Ethical Challenges

## Standard II-Impartiality

- What is the duty of impartiality when faced with extreme power imbalance?
- Can a mediator accept a fee from one side only?
- What is the duty regarding repeat players?
- What is the role of the mediator, if any, in protecting the public interest?
- What are the problems with evaluative mediation?

# Ethical Challenges

## Standard III-Conflicts of Interest

- What are the duties of “captive” mediators?
- What constitutes “conflict of interest?”

# Ethical Challenges

## Standard IV-Competence

- What is “necessary” or “reasonable” training mean?
- What is “requisite” training?
- Why is the competency standard so vague?

# Ethical Challenges

## Standard V

- Under what circumstances must a mediator divulge confidential information?
- What is the effect of the *Olam* and *Foxgate* decisions on California confidentiality?

# Ethical Challenges

## Standard VI-Quality of Process

- What is the difference between making a statement of law and offering legal advice?
- When should a mediator refer parties to professional advice?
- What is the effect of offering legal advice?

# Ethical Challenges

## Standard VII-Advertising

- If a mediator advertises her style, as "flexible" or "variable," does that violate the standard of truthfulness?

# Ethical Challenges Standard VIII-Fees

- What is reasonable?
- Is a mediator ethically obligated to provide pro bono service?
- Are contingent fees ethical?

# Ethical Challenges

## Standard IX-Process Obligation

- What cases are not suited for mediation?
- Should a mediator be concerned about justice?
- Should a mediator be concerned about the fairness of outcomes?
- How do these concerns correspond to the duty of neutrality and impartiality?

# Final Thoughts

- Ultimately, ethical decisions will be based on personal values.
- Training, experience, and seasoning will count.
- Go back to basics: self-determination, neutrality, confidentiality.

# Mediation Ethics

The End