

**What governs
the ethics of
mediation?**



**What should parties,
advocates and
mediators look to for
guidance?**

ETHICS ISSUES

**THE FOLLOWING ARE SOME
ETHICS ISSUES THAT
MEDIATORS SHOULD
CONSIDER.**

Do you explain to the parties in a mediation what mediation is about, how it works, that it is a process of party self-determination and what that means, and what your role is as the mediator?

Do you explain to the parties at the beginning of the mediation that the proceedings are confidential and/or privileged and what that means?

Do you explain to the parties at the beginning of a mediation that there are standards of conduct for mediators?

LAWS, RULES & STANDARDS

**WHAT OR WHO DETERMINES
THE APPLICABLE LAWS,
RULES AND STANDARDS THAT
GOVERN THE MEDIATION
PROCESS AND THE
MEDIATOR?**

LAWS, RULES & STANDARDS

WHAT IS MEDIATION?

IUMA DEFINITION

- A PROCESS IN WHICH**
- A MEDIATOR**
- FACILITATES COMMUNICATIONS & NEGOTIATIONS**
- BETWEEN PARTIES**
- TO REACH A VOLUNTARY AGREEMENT**
- REGARDING THEIR DISPUTE.**

WHAT ARE ETHICS?

- **A REFLECTIVE DISCIPLINE THAT SEEKS TO EVALUATE HUMAN CONDUCT FROM THE VIEWPOINT OF A VALUE SYSTEM.**

WHAT ARE ETHICS?

- **IT IS “DOING THE RIGHT THING.”**
- **HOW DO YOU KNOW YOU ARE “DOING THE RIGHT THING”?**
- **IS IT ENOUGH TO COMPLY WITH THE LAWS, RULES AND STANDARDS?**
- **CONSEQUENCES - WHAT ARE THEY?**

LAWS, RULES & STANDARDS

WHAT DICTATES THE LAWS, RULES AND STANDARDS TO APPLY TO THE PROCESS?

- **MAY DEPEND ON SUBJECT MATTER OR CONTEXT OF THE MEDIATION:**
 - **CIVIL DISPUTES**
 - **FAMILY LAW DISPUTES**
 - **CRIMINAL CASES**
 - **COURT ORDERED MEDIATIONS**
 - **FEDERAL COURT DISPUTES**

LAWS, RULES & STANDARDS

- **ORGANIZATION MEMBERSHIP MAY DICTATE**
 - **IDAHO MEDIATION ASSOCIATION**
 - **IDAHO STATE BAR**
 - **AMERICAN ARBITRATION ASSOC.**
 - **JUDICIAL ARBITRATION & MEDIATION SERVICES**

LAWS, RULES AND STANDARDS

- **Governing Laws and Rules:**
- **The Idaho Uniform Mediation Act (2008)**
- **Idaho Rule Of Evidence 507 (2008)**
- **Idaho Rule of Civil Procedure 37.1 (2016)**
- **Idaho Family Law Rules 601-603 (2014)**
- **Idaho Criminal Rule 18.1 (2011)**
- **Idaho Rules of Professional Conduct 1.6, 1.12, 2.2, 4.1 and 8.4. (2004)**
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LAWS, RULES AND STANDARDS

- **Alternative Dispute Resolution Act of 1998, 28 U.S.C. § § 651-658, which authorizes:**
- **U.S. District Court, Idaho Local Federal Rule 16.4 (2015)**

IDAHO LAWS

- **IDAHO UNIFORM MEDIATION ACT**
 - **Enacted in 2008**
 - **Based on National Uniform Act**
 - **Scope: applies to all types of mediations, except collective bargaining negotiations, mediations by school students or youths in correctional schools.**

IDAHO UNIFORM MEDIATION ACT

- **Purpose to provide for privilege & confidentiality in mediations.**
- **Know the “right of privilege” vs. “duty of confidentiality.”**

IDAHO UNIFORM MEDIATION ACT

- **Provides a privilege against disclosure of communications for parties, mediator and nonparty participants.**
 - **Parties can refuse disclosure of own statements, mediator's and others';**
 - **Mediator and others can refuse disclosure of own statements.**

IDAHO UNIFORM MEDIATION ACT

- **Allows parties to waive the privilege for selves but not mediator.**

IDAHO UNIFORM MEDIATION ACT

- **Provides exceptions to the privilege:**
 - (1) agreement signed by all parties;**
 - (2) if Public Records Act governs;**
 - (3) mediations under Open Meeting Law;**

IDAHO UNIFORM MEDIATION ACT

- **MORE EXCEPTIONS:**

(4) threats or statements of a plan to inflict bodily injury or crime;

(5) used to plan or commit a crime;

(6) offered to prove/disprove misconduct of mediator;

IDAHO UNIFORM MEDIATION ACT

More exceptions:

(7) Offered to prove/disprove misconduct by a party;

(8) Offered to prove/disprove abuse, neglect, abandonment or exploitation of child or adult in protective services;

IDAHO UNIFORM MEDIATION ACT

MORE EXCEPTIONS:

(9) If evidence is found to be needed in criminal case or to avoid a mediation contract where the need for evidence substantially outweighs interest in protecting confidentiality.

IDAHO UNIFORM MEDIATION ACT

- **PRECLUSIONS:**
- **Party may be precluded from asserting privilege if he/she discloses a mediation communication which prejudices another; disclosing person is precluded from asserting privilege when other person responds.**
- **Also if party uses mediation to plan or commit a crime; cannot assert privilege.**

IDAHO UNIFORM MEDIATION ACT

- **CONFIDENTIALITY:**
- **MEDIATION COMMUNICATIONS ARE CONFIDENTIAL (UNLESS SUBJECT TO OPEN MEETINGS LAW OR PUBLIC RECORDS ACT) TO THE EXTENT AGREED TO BY THE PARTIES OR PROVIDED BY OTHER LAW OR RULE.**

IDAHO UNIFORM MEDIATION ACT

- **IT IS IMPORTANT TO GET AN AGREEMENT BETWEEN/AMONG THE PARTIES REGARDING CONFIDENTIALITY.**
- **GET THE AGREEMENT IN WRITING.**

IDAHO UNIFORM MEDIATION ACT

- **Provides definitions:**
 - **“Mediation” is a process in which a mediator facilitates communications between parties to assist them in reaching a voluntary agreement regarding their dispute.**

IDAHO UNIFORM MEDIATION ACT

- “Mediation communication” includes any statement, whether oral or written that occurs during a mediation or for purposes of considering, conducting, participating in, initiating a mediation or retaining a mediator.

IDAHO UNIFORM MEDIATION ACT

- **“MEDIATION PARTY” MEANS A PERSON THAT PARTICIPATES IN A MEDIATION AND WHOSE AGREEMENT IS NECESSARY TO RESOLVE THE DISPUTE.**

IDAHO UNIFORM MEDIATION ACT

- **MEDIATOR IS ANY INDIVIDUAL WHO CONDUCTS A MEDIATION.**

IDAHO UNIFORM MEDIATION ACT

- **PROHIBITS MEDIATOR REPORTS TO COURT OR OTHERS EXCEPT TO DISCLOSE:**
 - **Mediation occurred, attendance and whether settled;**
 - **Any excepted communication;**
 - **Evidence of abuse, neglect, abandonment or exploitation of an individual; or**
 - **If permitted under family law mediation rules.**

IDAHO UNIFORM MEDIATION ACT

- **MEDIATORS MUST INQUIRE AND DISCLOSE CONFLICTS OF INTEREST BEFORE ACCEPTING MEDIATION ENGAGEMENT.**
- **OBLIGATION TO DISCLOSE IS ONGOING.**

IDAHO UNIFORM MEDIATION ACT

- IF REQUESTED, MEDIATOR MUST DISCLOSE QUALIFICATIONS TO SERVE AS MEDIATOR.**
- A MEDIATOR MUST BE IMPARTIAL UNLESS PARTIES AGREE OTHERWISE.**

IDAHO UNIFORM MEDIATION ACT

- **A PARTY HAS A RIGHT TO REPRESENTATION BY ATTORNEY OR OTHER PERSON DURING THE MEDIATION UNLESS OTHERWISE PROVIDED BY RULE OR ORDER OF COURT.**

RULES AND STANDARDS

- **IT IS IMPOSSIBLE IN THE TIME ALLOWED TO PRESENT THE DETAILS OF THE RULES AND STANDARDS. THIS OVERVIEW WILL GIVE YOU AN IDEA OF THE CONTENT THAT YOU NEED TO STUDY ON YOUR OWN SCHEDULE.**

SOURCES OF RULES

- **Idaho Rule of Evidence 507**
- **Idaho Rule of Civil Procedure 37.1**
- **Idaho Family Law Rules 601-603**
- **Idaho Criminal Rule 18.1**
- **Idaho Rules of Professional Conduct**
- **U.S. District Court Rules**

EVIDENCE RULE 507

- **PROVIDES RIGHT OF PRIVILEGE TO PARTIES, MEDIATOR OR OTHER PARTICIPANTS TO PROTECT MEDIATION COMMUNICATIONS FROM DISCLOSURE OR DISCOVERY IN COURT PROCEEDINGS IN IDAHO STATE COURTS.**

EVIDENCE RULE 507

- **THE PRIVILEGES GRANTED ARE THE SAME AS PROVIDED BY THE IDAHO UNIFORM MEDIATION ACT.**
- **REASONS FOR BOTH THE IUMA AND IRE 507.**

IDAHO RULE CIVIL PROCEDURE 37.1

- **Formerly 16(k))**
- **Covers all civil cases except family law cases.**
- **Defines Mediation as a process by which a neutral mediator assists parties in reaching a mutually acceptable agreement.**

I.R.C.P. 37.1

- **Role of mediator is to aid parties in identifying issues, reducing misunderstandings, clarifying priorities, exploring areas of compromise and finding points of agreement.**
- **If court appointed must select in 28 days and hold first session in 42 days.**

I.R.C.P. 37.1

- Must report to court in 7 days whether settled.**
- Compensation at regular fees.**
- Can enforce comp. by motion.**
- Mandates impartiality.**
- Mandates abide by parties' confidentiality agreement.**

I.R.C.P. 37.1

- **Rules 408 (offers are inadmissible) and 507 (privileges) apply.**
- **Attendance with authority to settle is mandatory unless excused.**
- **Mediator is subject to sanctions if does not follow these rules.**

Idaho Family Mediation Rules

IRFLP 601 (FORMER IRCP 16(j)):

- PROVIDES FOR SCREENING OF CASES INVOLVING CHILDREN AND AUTHORIZES COURT TO COMPEL MEDIATION.**

FAMILY MEDIATION RULES

- RULE 602: PROVIDES FOR MEDIATION OF CUSTODY AND VISITATION DISPUTES.**
- COVERS ALL DOMESTIC RELATIONS ACTIONS.**
- AUTHORIZES MANDATORY MEDIATION.**
- REQUIRES QUALIFICATIONS AND NAME ON LIST MAINTAINED BY COURT.**

FAMILY MEDIATION RULES

- **DUTIES OF MEDIATOR; MUST DESCRIBE:**
 - **DIFFERENCE BETWEEN MEDIATION AND OTHER FORMS OF DISPUTE RESOLUTION;**
 - **CIRCUMSTANCES WHEN MEDIATOR WILL MEET ALONE WITH A PARTY;**
 - **CONFIDENTIALITY OF THE PROCEEDING AND PRIVILEGE AGAINST DISCLOSURE;**

FAMILY MEDIATION RULES

- **MORE DUTIES:**
 - **INFORM PARTIES AGREEMENT MUST BE BY MUTUAL CONSENT;**
 - **ADVISE PARTIES TO SEEK INDEPENDANT LEGAL COUNSEL;**
 - **INFORMATION NEEDED TO DEFINE DISPUTED ISSUES.**

FAMILY MEDIATION RULES

- **MEDIATOR HAS DUTY TO BE IMPARTIAL AND ADVISE PARTIES OF FACTS BEARING ON POSSIBLE BIAS, PREJUDICE OR IMPARTIALITY.**

FAMILY MEDIATION RULES

- **RULE 603:**
- **MEDIATION OF OTHER MATTERS**
 - **A DUPLICATION OF I.R.C.P. 37.1 EXCEPT ADDS PROVISION FOR QUALIFICATIONS OF MEDIATORS.**

IDAHO CRIMINAL RULE 18.1

- **APPLIES IN ANY CRIMINAL PROCEEDING.**
- **PARTICIPATION IS VOLUNTARY AND OCCURS ONLY IF ALL PARTIES AGREE.**
- **COVERS ALL MISDEMEANOR AND FELONY CASES.**
- **MEDIATOR IS SELECTED BY THE COURT FROM ROSTER OF SENIOR OR SITTING JUDGES OR JUSTICES.**

IDAHO RULES OF PROFESSIONAL CONDUCT FOR LAWYERS

RULE 1.6: CONFIDENTIALITY OF INFORMATION

**RULE 1.12: FORMER MEDIATOR OR OTHER
THIRD-PARTY NEUTRAL**

**RULE 2.2: LAWYER SERVING AS THIRD-PARTY
NEUTRAL**

**RULE 4.1: TRANSACTIONS WITH PERSONS
OTHER THAN CLIENTS**

RULE 8.4: MISCONDUCT

I.R.P.C. 1.6

- **RULE 1.6 - CONFIDENTIALITY OF INFORMATION.**
- **OBLIGATION TO NOT REVEAL INFORMATION RELATING TO REPRESENTATION OF CLIENT UNLESS GIVEN INFORMED CONSENT OR IMPLIEDLY AUTHORIZED TO PERFORM SERVICE OR WHEN IT IS NECESSARY:**

I.R.P.C. 1.6

- **NECESSARY TO:**
 - **PREVENT CRIME BY CLIENT;**
 - **PREVENT DEATH OR BODILY HARM;**
 - **PREVENT FINANCIAL INJURY TO ANOTHER;**
 - **SECURE LEGAL ADVICE ABOUT COMPLIANCE WITH THESE RULES;**
 - **ESTABLISH CLAIM OR DEFENSE TO CLAIM BY CLIENT.**

I.R.P.C. 1.12

- **RULE 1.12- FORMER JUDGE, ARBITRATOR, MEDIATOR OR OTHER THIRD-PARTY NEUTRAL.**
- **CANNOT REPRESENT ANYONE IN CONNECTION WITH A MATTER IN WHICH THE LAWYER WAS A JUDGE, MEDIATOR, ETC., UNLESS ALL PARTIES CONSENT IN WRITING.**

I.R.P.C. 2.2

- **RULE 2.2-SERVING AS THIRD-PARTY NEUTRAL.**
- **WHEN ASSISTS PERSONS NOT CLIENTS TO RESOLVE A DISPUTE.**
- **INCLUDES ARBITRATION AND MEDIATION.**
- **LAWYER MUST EXPLAIN NO ATTORNEY-CLIENT RELATIONSHIP EXISTS.**
- **SHOULD ALSO MAKE CLEAR NO FIDUCIARY RELATIONSHIP EXISTS.**

I.R.P.C. 4.1

- **RULE 4.1 – TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS:**
- **CANNOT MAKE A FALSE STATEMENT OF MATERIAL FACT OR LAW TO ANY PERSON;**
- **CANNOT FAIL TO DISCLOSE A MATERIAL FACT WHEN NECESSARY TO AVOID MISREPRESENTATION OR CRIMINAL OR FRAUDULENT ACT BY CLIENT UNLESS PROHIBITED BY RULE 1.6.**

I.R.P.C. 8.4

- **RULE 8.4 – MISCONDUCT EXISTS IF:**
- **VIOLATE THESE RULES;**
- **COMMIT A CRIMINAL ACT;**
- **ENGAGE IN DISHONESTY, FRAUD, ETC.;**
- **ENGAGE IN CONDUCT PREJUDICIAL TO ADMINISTRATION OF JUSTICE;**
- **IMPLY CAN IMPROPERLY INFLUENCE AN OFFICIAL;**
- **ASSIST A JUDGE TO VIOLATE JUDICIAL RULES.**

FEDERAL COURT RULE 16.4

- **AUTHORIZES MEDIATION OF FEDERAL CIVIL CASES.**
- **COVERS ALL CIVIL CASES.**
- **MEDIATOR CAN BE SELECTED FROM LIST OR OFF THE LIST.**
- **MEDIATOR MUST REPORT TO COURT WHETHER MEDIATION OCCURRED AND WHETHER SETTLED.**

STANDARDS OF PRACTICE

- **IMA STANDARDS OF PRACTICE**
- **MODEL STANDARDS ADOPTED BY IDAHO STATE BAR in 2005**
- **MODEL STANDARDS OF ABA/AAA/ACR**
- **MODEL STANDARDS FOR FAMILY AND DIVORCE MEDIATION (2000)**
- **ASSOCIATION OF FAMILY AND CONCILIATION COURTS RE: CHILD PROTECTION MEDIATION**

IMA STANDARD I.

I. FACILITATING THE PROCESS

- 1. Educate parties about mediation**
- 2. Assess willingness and ability**
- 3. Consider absentee parties**
- 4. Assist parties to identify issues**

IMA STANDARD I.

- 5. Disclose biases or strong views**
- 6. Insist on disclosure by parties**
- 7. Reach agreement on procedures**
- 8. Explain fees for services**
- 9. Encourage independent lawyers**

IMA STANDARD II.

II. CONFIDENTIALITY

- 1. Foster confidentiality**
- 2. Inform parties of duty to report**
- 3. Refrain from legal testimony**
- 4. Storage and disposal of records**
- 5. Consent to release information**

IMA STANDARD III.

III. IMPARTIALITY

- 1. Disclose affiliations**
- 2. Post-mediation relationships**
- 3. Post-mediation representation**
- 4. Conflict of interest prohibited**
- 5. Assist to reach settlement**
- 6. Providing professional advice**

IMA STANDARDS IV., V., VI.

IV. CONCLUDING MEDIATION

- 1. With agreement-discuss documenting**
- 2. Without agreement-declare impasse**

V. PUBLICITY AND ADVERTISING

- 1. Maintain truth in advertising**

VI. PROFESSIONAL RELATIONSHIPS

- 1. Keep other mediator informed**
- 2. Respect relationships with others**

IMA STANDARDS VII., VIII.

VII. TRAINING AND CONTINUING ED.

- 1. Acquire substantive knowledge & procedural skills**
- 2. Participate in continuing education**

VIII. ADVANCEMENT OF MEDIATION

- 1. Provide pro bono service and mentor others**

ABA-AAA-ACR 2005

MODEL STANDARDS OF PRACTICE

ADOPTED BY IDAHO STATE BAR IN 2008

I. SELF-DETERMINATION of parties

II. IMPARTIALITY of mediator required

III. CONFLICTS OF INTEREST prohibited

IV. COMPETENCE is mandatory

MODEL STANDARDS

- **V. CONFIDENTIALITY** is mandatory
- **VI. QUALITY OF PROCESS** is required
- **VII. ADVERTISING AND SOLICITATION** must be truthful
- **VIII. FEES AND OTHER CHARGES** must be explained to parties
- **IX. ADVANCEMENT OF MEDIATION PRACTICE** should be promoted

MODEL STANDARDS FOR FAMILY AND DIVORCE MEDIATION

- **Standard I.**
- **A family mediator shall recognize that mediation is based on the principle of self-determination by the participants.**
- **Standard II.**
- **A family mediator shall be qualified by education and training to undertake the mediation.**

FAMILY MEDIATION

- **Standard III.**
- **A family mediator shall facilitate the participants' understanding of what mediation is and assess their capacity to mediate before the participants reach an agreement to mediate.**

FAMILY MEDIATION

- **Standard IV.**
- **A family mediator shall conduct the mediation process in an impartial manner. A family mediator shall disclose all actual and potential grounds of bias and conflicts of interest reasonably known to the mediator. Parties can waive conflict unless impartiality is clearly impaired.**

FAMILY MEDIATION

- **Standard V.**
- **A family mediator shall fully disclose and explain the basis of any compensation, fees and charges to the participants.**

FAMILY MEDIATION

- **Standard VI.**
- **A family mediator shall structure the mediation process so that the participants make decisions based on sufficient information and knowledge.**

FAMILY MEDIATION

- **Standard VII.**
- **A family mediator shall maintain the confidentiality of all information acquired in the mediation process, unless the mediator is permitted or required to reveal the information by law or agreement of the parties.**

FAMILY MEDIATION

- **Standard VIII.**
- **A family mediator shall assist participants in determining how to promote the best interests of children.**

FAMILY MEDIATION

- **Standard IX.**
- **A family mediator shall recognize a family situation involving child abuse or neglect and take appropriate steps to shape the mediation process accordingly.**

FAMILY MEDIATION

- **Standard X.**
- **A family mediator shall recognize a family situation involving domestic abuse and take appropriate steps to shape the mediation process accordingly.**

FAMILY MEDIATION

- **Standard XI.**
- **A family mediator shall suspend or terminate the mediation process when the mediator reasonably believes that a participant is unable to effectively participate or for other compelling reason.**

FAMILY MEDIATION

- **Standard XII.**
- **A family mediator shall be truthful in the advertisement and solicitation for mediation.**

- **Standard XIII.**
- **A family mediator shall acquire and maintain professional competence in mediation.**

ASSOC. FAMILY & CONCILIATION COURT GUIDELINES

- **PROVIDE GUIDELINES FOR CHILD PROTECTION MEDIATION, CHILD CUSTODY EVALUATION, AND INTIMATE PARTNER VIOLENCE.**
- **PROMOTES INVOLVMENT OF PARENTS AND CHILDREN IN RESOLUTION OF DISPUTES.**
- **PROMOTES COLLABORATIVE DECISION MAKING.**

ETHICS ISSUES REVISITED

- **WHAT STANDARDS APPLY TO THESE ETHICS ISSUES?**
- **1. WHAT IS MEDIATION AND YOUR ROLE?**
- **2. CONFIDENTIALITY AND PRIVILEGE?**
- **3. GOVERNING STANDARDS?**

ETHICS ISSUE 1.

- **1. Do you explain to the parties in a mediation what mediation is about, how it works, that it is a process of party self-determination and what that means, and what your role is as the mediator?**
 - What standards apply to guide you?**

ETHICS ISSUE NO. 1

- **IRFLP 602(g) The mediator has a duty to define and describe for the parties the process of mediation and its cost during the initial conference before the mediation conference begins. The description should include the following:**

ETHICS ISSUE NO. 1

- **a) the difference between mediation and other forms of conflict resolution, including therapy and counseling;**
- **b) the circumstances under which the mediator will meet alone with either of the parties or with any other person;**

ETHICS ISSUE NO. 1

- **c) any confidentiality of the mediation proceedings and any privilege against disclosure;**
- **d) the duties and responsibilities of the mediator and of the parties;**
- **e) the fact that any agreement reached will be reached by mutual consent of the parties;**

ETHICS ISSUE NO. 1

- **f) the mediator shall advise the participants to seek independent legal counsel prior to resolving the issues and in conjunction with formalizing an agreement, and**
- **g) the information necessary for defining the disputed issues.**

ETHICS ISSUE NO. 1

- **IMA Standards of Practice:**
- **I.1. A mediator has a duty to educate parties about the mediation process so that parties understand the differences between mediation, arbitration, and other forms of conflict resolution, as well as therapy, counseling, or legal representation.**

ETHICS ISSUE NO. 1

- **Model Standards for Family and Divorce Mediation**
- **Standard III. A.**
- **Before family mediation begins a mediator should provide the participants with an overview of the process and its purposes, including the following:**

ETHICS ISSUE NO. 1

- 1. Mediation is consensual; mediator is impartial facilitator and may not impose or force settlement on parties;**
- 2. Distinguish family mediation from other processes designed to address family issues and disputes;**

ETHICS ISSUE NO. 1

- **3. Inform parties agreements reached will be reviewed by court when court approval is required;**
- **4. Inform parties they may obtain independent advice of counsel, advocates, accountants, therapists, others during the process;**

ETHICS ISSUE NO. 1

- 5. Advise parties, in appropriate cases that they can seek advice of religious figures, elders or others;**
- 6. Discuss issue of separate sessions with parties, describe circumstances when may do so, and conditions of confidentiality concerning separate sessions;**

ETHICS ISSUE NO. 1

7. Inform parties that presence of other persons depends on agreement of parties and mediator unless statute or regulation requires otherwise;

8. Describe obligation of mediator to maintain confidentiality of process and results, and any exceptions;

ETHICS ISSUE NO. 1

- **9. Advise parties of circumstances when mediator may suspend or terminate the process and that a party has right to do so at any time.**

ETHICS ISSUE NO. 2

- Do you explain to the parties at the beginning of the mediation that the proceedings are confidential and/or privileged and what that means?**
- What standards guide you?**

ETHICS ISSUE NO. 2

- **IMA I.1: Duty to educate parties about the process; foster confidentiality; inform of duty to report child abuse.**
- **IRFLP 602 G.1.c: Child custody disputes; mediator's duties include providing parties a description of confidentiality and privileges against disclosure.**

ETHICS ISSUE NO. 2

- **IRFLP 603 K: Confidentiality: The mediator shall abide by the confidentiality rules agreed to by the parties. Confidentiality protections of IRE 408 and 507 shall extend to mediations under this Rule**
- **IRCP 37.1: Mediator must abide by agreement of parties re confidentiality.**

ETHICS ISSUE NO. 2

- **UMA 9-808: Confidentiality is governed by parties' agreement or other law.**
- **ICR 18.1(6) Confidentiality. Except as provided in I.C. 16-1605, mediation proceedings shall in all respects be confidential and not reported or recorded.**

ETHICS ISSUE NO. 2

- **Model Standards Of Conduct V:**
- **Mediator shall maintain confidentiality unless otherwise agreed; cannot disclose what learned in caucus without consent.**

ETHICS ISSUE NO. 2

- **Model Stds. Of Pract. For Family and Divorce Mediation:**
- **Std. III: A family mediator shall facilitate the participants' understanding of what mediation is...**
- **(8) describing the obligation of mediator to maintain confidence of process and results.**

ETHICS ISSUE NO. 2

- **Std. VII: a family mediator shall maintain the confidentiality of all information acquired in the mediation process, unless permitted or required to reveal by law or agreement of parties.**
 - (a) should discuss parties expectations of confidentiality prior to the mediation;**
 - (b) should explain exceptions and limitations of confidentiality.**

ETHICS ISSUE NO. 3

- **Do you explain to the parties at the beginning of a mediation that there are standards of conduct for mediators?**
- **-- What standard(s) apply to guide you?**

ETHICS ISSUE NO. 3

- **IRFLP 602 G. c. Mediation of Child Custody and Visitation Disputes: The mediator has a duty to define and describe for the parties the duties and responsibilities of the mediator and the parties.**

ETHICAL DILEMMA-COMPETENCY

- **KEEPING WITHIN LIMITS OF DIAGNOSTIC COMPETENCY:**
- **EXAMPLE: Custody mediation; husband is dictating terms to wife who appears nervous and fearful; husband makes threat to harm wife but wife says “he always talks like that but never does anything.”**
- **QUESTION: What should mediator do? Should mediator have training in domestic violence?**

ETHICAL DILEMMA-COMPETENCY

- **KEEPING WITHIN LIMITS OF DIAGNOSTIC COMPETENCY:**
- **EXAMPLE: Landlord/tenant mediation; tenant who appeared normal in session tells mediator he is late with payments at times because the voices from the transmitter in his neck get him confused at times. He has no implant.**
- **What should the mediator do?**

ETHICAL DILEMMA-COMPETENCY

- KEEPING WITHIN LIMITS OF SUBSTANTIVE COMPETENCY:
- EXAMPLE: Nonlawyer family mediator is asked to mediate a business dispute re a failed business deal; both parties have counsel; both know she is a nonlawyer but they want her mediation skills; she knows nothing about the legal issues involved.
- What should the mediator do?

ETHICAL DILEMMA-IMPARTIALITY

- **PRESERVING IMPARTIALITY-RELATIONSHIPS:**
- **EXAMPLE:** One party is manager of the mediator's condo complex; dispute does not involve condo; fact is disclosed and other party wants to proceed; mediator is concerned if she has to engage in persuasion with that party, will he become suspicious because of the relationship with manager.
- **What should the mediator do?**

ETHICAL DILEMMA-IMPARTIALITY

- IMPARTIALITY-SUBSEQUENT RELATIONSHIPS:
- Two weeks after mediation, one party invites mediator to lunch to discuss unrelated matter; at restaurant, they encounter other party to the mediation; is the perception of impartiality compromised? Does it matter?
- What should the mediator do?

ETHICAL DILEMMA-IMPARTIALITY

- **PRESERVING IMPARTIALITY-RELATIONSHIPS:**
- **EXAMPLE: Mediation over damage to property; one party is white and one Hispanic; mediator is Hispanic.**
- **Should mediator do anything to address the possible appearance of partiality?**

ETHICAL DILEMMA-IMPARTIALITY

- IMPARTIALITY-PERSONAL REACTIONS:
- **EXAMPLE:** In mediation between two co-tenants of building, one is a white man with black daughter; other party is white and makes references to “them”, “their kind,” “those people,” which offends mediator who perceives the party as a repulsive racist.
- What should mediator do?

ETHICAL DILEMMA-IMPARTIALITY

- IMPARTIALITY-ANTIPATHY:
- **EXAMPLE:** Custody mediation; noncustodial husband wants child visit around Christmas and wife refuses to allow visits more than one afternoon at a time; mediator sees no reason for refusal other than plain meanness which makes mediator feel very negative toward wife.
- **What should mediator do?**

ETHICAL DILEMMA-IMPARTIALITY

- **IMPARTIALITY-SYMPATHY:**
- **EXAMPLE: Divorce mediation; wife is displaced homemaker, middle-aged, never worked outside the home or dealt with complicated financial issues; husband is business executive; wife struggles with property issues; mediator has strong reaction of sympathy to wife and wants to help her.**
- **What should mediator do?**

ETHICAL DILEMMA-CONFIDENTIALITY

- **MAINTAINING CONFIDENTIALITY:**
- **EXAMPLE:** mediation between two tenants over noise and disturbances; one accuses other of dealing drugs in his apartment; accused never admits but never denies; he agrees to have no illegal substances in his apartment.
- **What should mediator do? Report to police?**

ETHICAL DILEMMA-CONFIDENTIALITY

- **MAINTAINING CONFIDENTIALITY:**
- **Court-ordered mediation of personal injury case; guardian for disabled minor with strong claim of \$500,000 accepted \$250,000 settlement; all but \$45,000 will be consumed in fees and costs, including \$100,000 attorney fee. Victim's attorney and the guardian recommend acceptance; mediator thinks is inadequate to support victim for life and wants to notify court of this. Should he?**

ETHICAL DILEMMA-CONFIDENTIALITY

- **MAINTAINING CONFIDENTIALITY:**
- **EXAMPLE:** mediation of condo dispute results in oral agreement and lawyers agree to document it; a week later one party calls the mediator and says other party now denies agreement; he asks mediator to testify in court that settlement was reached without more.
- **What should mediator do?**

ETHICAL DILEMMA-CONFIDENTIALITY

- **MAINTAINING CONFIDENTIALITY:**
- **EXAMPLE: Divorce mediation; mediator sees wife needs emotional and financial counseling and not getting any; wife's lawyer is not present in mediation and has not seen wife try to deal with husband; mediator suggests to wife she discuss counseling with her attorney or he can make call; she refused.**
- **Should mediator call her attorney?**

ETHICAL DILEMMA-CONFIDENTIALITY

- **PRESERVING-CONFIDENTIALITY:**
- **EXAMPLE:** Business mediation over repayment of loan; parties agree to settlement in which debtor agrees to assign to lender an interest in a lawsuit debtor is pursuing against another; in caucus debtor tells mediator suit is tenuous and he may be unable to continue it but “don’t tell lender.”
- **What should mediator do?**

ETHICAL DILEMMA-CONFIDENTIALITY

- **MAINTAINING CONFIDENTIALITY:**
- **EXAMPLE: Personal injury mediation; injurer has made offer, but victim holds out for much more; injurer tells mediator he has victim under surveillance and knows victim is faking; mediator suggests injurer tell victim but he refuses.**
- **What should mediator do?**

ETHICAL DILEMMA-CONSENT

- **ENSURING INFORMED CONSENT:**
- **EXAMPLE: Family mediation; husband threatens wife; wife wants to keep going; mediator believes past violence has occurred and feels qualified to determine the intimidation is real and influencing wife's actions.**
- **Should mediator terminate the session because of coercion?**

ETHICAL DILEMMA-CONSENT

- **ENSURING INFORMED CONSENT:**
- **EXAMPLE:** Multiparty personal injury case, with a single injurer; lawyer for victim “A” stated a flat demand and won’t budge; also refuses to let client speak or be spoken to directly by mediator; other victims plan to accept a package and leave victim “A” little or nothing from limited coverage; mediator wants to explain situation to victim “A”.
- **What can mediator do?**

ETHICAL DILEMMA-CONSENT

- **MEDIATOR COERCION:**
- **EXAMPLE: Divorce mediation; husband objects to wife having custody on religious grounds; she was unfaithful and is “a sinner;” husband feels moral obligation to keep child from her influence; mediator wants to confront husband for sake of child.**
- **What should mediator do?**

ETHICAL DILEMMA-CONSENT

- MEDIATOR COERCION:
- **EXAMPLE:** Personal injury claim mediation; victim made what mediator knows to be a very fair demand; injurer rejected it; mediator sees that victim can be pushed to lower her demand even more.
- **What should mediator do?**

ETHICAL DILEMMA-CONSENT

- SUSPICION OF PARTY INCAPACITY:
- **EXAMPLE:** Divorce mediation; husband appears depressed and disoriented; drifts away from discussion; cannot remember what is being discussed and shows other signs of mental disturbance; when asked if he wants to stop, he rallies and says he wants to proceed.
- **What should mediator do?**

ETHICAL DILEMMA-CONSENT

- **PARTY IGNORANCE:**
- **EXAMPLE:** Mediation of business dispute over breach of contract; most of terms are settled including damages to be paid by Party “A” who tells mediator he will likely file bankruptcy before payment due date but “don’t tell” Party “B”; Party “B” has not asked for collateral security.
- **What should the mediator do?**

ETHICAL DILEMMA-CONSENT

- **PARTY IGNORANCE:**
- **EXAMPLE:** One of parties is ignorant of legal rule that would operate in his favor and which mediator knows; the party is about to settle but could do much better if knew the rule.
- **What should mediator do?**

ETHICAL DILEMMA-NONDIRECTIVENESS

- **PRESERVING SELF-DETERMINATION/
MAINTAINING NONDIRECTIVENESS:**
- **EXAMPLE: Divorce mediation; issues settled but one—family business must be valued; parties cannot agree on value; they ask mediator to put value on the business which they will accept.**
- **What should mediator do?**

ETHICAL DILEMMA-NONDIRECTIVENESS

- **PRESERVING SELF-DETERMINATION/
MAINTAINING NONDIRECTIVENESS:**
- **EXAMPLE: Mediation of business contract dispute; plaintiff claims \$200,000 damages and defendant offers \$75,000; after 3 hours they are stalled at \$150,000 vs \$110,000; parties ask mediator to tell them his opinion as to a reasonable settlement.**
- **What should mediator do?**

ETHICAL DILEMMA-NONDIRECTIVENESS

- **PRESERVING SELF-DETERMINATION/
MAINTAINING NONDIRECTIVENESS:**
- **EXAMPLE: Personal injury mediation; mediator is experienced and knows case is worth around \$50,000 if goes to trial; parties are still feeling each other out and have not moved from excessive initial demand and lowball offer.**
- **What should mediator do?**

ETHICAL DILEMMA-NONDIRECTIVENESS

- **PRESERVING SELF-DETERMINATION/**
MAINTAINING NONDIRECTIVENESS:
- **EXAMPLE: Personal injury case; bottom lines of parties overlap; injurer says in caucus he will go to \$40,000; victim says in caucus he will take \$30,000. Mediator knows \$35,000 would settle the case.**
- **What should mediator do?**

ETHICAL DILEMMA-NONDIRECTIVENESS

- **PRESERVING SELF-DETERMINATION/
MAINTAINING NONDIRECTIVENESS:**
- **EXAMPLE:** Husband and wife agree in mediation wife to have sole custody of child and husband agrees to waive visitation; the law of their state forbids sole custody as against public policy.
- **What should mediator do?**

ETHICAL DILEMMA-NONDIRECTIVENESS

- **PRESERVING SELF-DETERMINATION/
MAINTAINING NONDIRECTIVENESS:**
- **EXAMPLE: Personal injury wrongful death case with several survivors including minor child and spouse; spouse agrees to settle providing \$20,000 for each survivor; are finalizing agreement; mediator knows law of their state requires appointment of guardian ad litem for minor child and is not done.**
- **What should mediator do?**

ETHICAL DILEMMA-NONDIRECTIVENESS

- **PRESERVING SELF-DETERMINATION**
- **EXAMPLE: Divorce mediation; husband says he built family house and it is legally his; he is adamant and wife is uncertain and is intimidated; she is prepared to accept his demand even when little other assets exist; mediator thinks wife is bullied and knows husband's claim is groundless.**
- **What should mediator do?**

ETHICAL DILEMMA-NONDIRECTIVENESS

- **PRESERVING SELF-DETERMINATION**

EXAMPLE: Personal injury mediation; victim is about to settle for half of what is a solid \$500,000 claim, based on his lawyer's advice given because lawyer missed deadline for disclosing experts and fears trial where error will be disclosed. Mediator knows attorney missed deadline.

- **What should mediator do?**