

MEDIATION PROGRAM

for the Equal Employment Opportunity Complaint Process



U.S. Department
of Transportation

Federal Highway
Administration

INTRODUCTION

The U.S. Equal Employment Opportunity Commission's regulation at Title 29, Code of Federal Regulations, Part 1614.102(b)(2) requires Federal agencies to establish or make available an Alternative Dispute Resolution (ADR) program. The ADR program must be available during both the pre-complaint stage and the formal complaint stage of the equal employment opportunity (EEO) complaint process.

ADR is a range of problem-solving approaches used for resolving conflict in lieu of more formal and/or adversarial processes, such as court litigation. ADR approaches may be used to resolve a portion of, or an entire claim. Such approaches usually involve the use of a neutral third party who works with the parties involved in the dispute to help them find mutually acceptable solutions.

The Federal Highway Administration (FHWA) is committed to using mediation as its form of ADR to resolve claims of discrimination. Mediation is an ADR technique in which a mediator assists parties with communication to achieve understanding, identify interests, and potentially achieve a mutually beneficial resolution to the matters in a dispute.

When deemed appropriate, the FHWA will offer mediation during any stage of the EEO complaint process. It is strictly voluntary for the aggrieved person/complainant to participate in mediation. Once mediation is offered and accepted by the aggrieved person/complainant, it is mandatory for management to participate. The efficient and effective use of mediation will help resolve discrimination disputes at an early stage in an expeditious, cost-effective, and mutually acceptable manner. Continuous training opportunities will be provided to FHWA employees and managers to enhance their understanding of the theory and practice of mediation. In addition, the Mediation Program will be evaluated to determine whether the program is achieving its goals. The results will be used to make the Mediation Program more effective.

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CHAPTER 1. GENERAL

1-1. PURPOSE. The Federal Highway Administration (FHWA) establishes and provides a Mediation Program to resolve allegations of discrimination raised in the equal employment opportunity (EEO) complaint process.

1-2. SCOPE. The Mediation Program will address matters covered by Title VII of the Civil Rights Act of 1964 (discrimination based on race, color, religion, sex, national origin); the Age Discrimination in Employment Act of 1967 (discrimination based on age, when the employee is at least 40 years old); the Rehabilitation Act of 1973 (discrimination based on physical or mental disabilities); the Equal Pay Act of 1963 (sex-based wage discrimination); the Genetic Information Nondiscrimination Act of 2008 (discrimination based on genetic information); and complaints of discrimination based on reprisal and sexual orientation.

1-3. OBJECTIVE. The objective of the Mediation Program is to resolve allegations of workplace discrimination at the earliest possible stage of the EEO complaint process. Early resolution benefits the FHWA and its employees by creating a more hospitable workplace for all. Other benefits include reduction of time and the significant costs associated with processing EEO complaints. Mediation may be used at any stage of the EEO complaint process.

1-4. AUTHORITIES.

- a. **The Civil Rights Act of 1991 (CRA).** The CRA encourages the use of Alternative Dispute Resolution (ADR) to resolve disputes arising out of discrimination and unlawful harassment in the workplace.
- b. **The Administrative Dispute Resolution Act of 1996 (ADRA).** The ADRA gives Federal agencies the authority to utilize dispute resolution methods to resolve claims in controversy that relate to an administrative program, if the parties agree to such methods.
- c. **Title 29, Code of Federal Regulations, Part 1614, Federal Sector Equal Employment Opportunity.** This regulation is issued by the U.S. Equal Employment Opportunity Commission (EEOC) and requires Federal agencies to establish or make available an ADR program during all stages of the EEO complaint process.
- d. **EEOC's Management Directive-110.** Chapter 3 of this Directive provides guidance to Federal agencies regarding the establishment of an ADR program for EEO cases and correlation between ADR and the EEO complaint process.

1-5. DEFINITIONS.

- a. **Agency Official.** The individual who participates in mediation on behalf of the FHWA. This individual has the authority to grant or deny relief, or has access to those in authority who may grant or deny the requested relief. The individual may be the senior management official (i.e., Associate Administrator, Division Administrator, Director of Field Service, etc.) in the program office involved, the responsible management official (RMO) named by an aggrieved person/

complainant (i.e., first-line manager), or another official designated by the senior management official. NOTE: If a senior management official is named in the dispute, it is mandatory that he/she participates in the session as the Agency Official.

- b. **Agency Representative.** An individual (e.g., attorney) who represents the FHWA and advises the Agency Official regarding laws, regulations, and policies that govern resolution terms.
- c. **Aggrieved Person.** An individual who alleges workplace discrimination and/or harassment.
- d. **Associate Administrator for Civil Rights.** The management official responsible for civil rights programs within the FHWA. This official, or his/her designee, is also responsible for deciding whether mediation is appropriate for an EEO matter.
- e. **Caucus.** A private meeting between the mediator(s) and one of the parties involved in the dispute.
- f. **Co-mediation.** Mediation conducted by more than one mediator working together as a team.
- g. **Complainant.** An individual who has completed the pre-complaint stage and filed a formal EEO complaint with the Departmental Office of Civil Rights (DOCR), Compliance Operations Division.
- h. **Dispute.** The claim(s) raised in the pre-complaint or formal complaint stages of the EEO complaint process.
- i. **EEO Complaint Process.** The regulatory process set forth in Title 29, Code of Federal Regulations, Part 1614, for raising claims of prohibited discrimination.
- j. **EEO Counselor.** A neutral individual who informs the aggrieved person and the manager named in the dispute of their rights and responsibilities under the EEO complaint process. The EEO Counselor is not a mediator and does not conduct mediations.
- k. **Employee Representative.** An individual designated by the aggrieved person/complainant to accompany, advise, and/or represent the aggrieved person/complainant.
- l. **Formal Complaint Stage.** The regulatory process set forth in Title 29, Code of Federal Regulations, Part 1614 that begins when a claim raised in the pre-complaint stage remains unresolved and the aggrieved person pursues the matter through the filing of a formal complaint with the DOCR Compliance Operations Division.
- m. **Mediation Coordinator.** The individual in the Office of Civil Rights responsible for managing the FHWA's Mediation Program (i.e., coordinating mediation sessions, assigning mediators, ensuring the integrity of the process, and monitoring and evaluating the effectiveness of the Mediation Program).

- n. **Mediator.** A neutral third party trained in mediation techniques. The mediator facilitates an open discussion between the parties in a dispute, assists in identifying potential solutions, and assists in drafting a settlement agreement should the parties successfully negotiate resolution. A mediator has no authority to impose a decision or resolution on the parties.
- o. **Parties.** The aggrieved person/complainant, employer, and representatives.
- p. **Pre-Complaint Stage.** The initial problem-solving phase of the EEO complaint process as set forth in Title 29, Code of Federal Regulations, Part 1614. This phase involves EEO counseling and, if elected, mediation.
- q. **Responsible Management Official (RMO).** The manager named by the aggrieved person/complainant in the EEO matter.
- r. **Settlement Agreement.** A formal written agreement that defines the terms agreed upon by the parties in a dispute.

CHAPTER 2. PROCEDURES FOR MEDIATION

2-1. REQUEST FOR MEDIATION.

- a. **Requesting Mediation.** Mediation may be requested by an aggrieved person/complainant or manager. The FHWA Office of Civil Rights will review all requests to determine whether to offer mediation. If mediation is offered and accepted by the aggrieved person/complainant, it will be mandatory for management officials to participate in mediation. If mediation is not offered, the aggrieved person/complainant will be referred to the appropriate EEO representative to continue processing the EEO matter in accordance with Title 29, Code of Federal Regulations, Part 1614.
- b. **Mediation Option.**

- (1) **Pre-complaint Stage.** During the initial discussion with the aggrieved person, the EEO Counselor will inform the aggrieved person of his/her rights and responsibilities in the EEO complaint process. This will include a description of the FHWA's Mediation Program, the opportunity to participate in the program when the Agency agrees to offer mediation, and the right to file a formal complaint, if mediation does not result in a resolution.

The EEO Counselor will include a *Request for Mediation Form* (Appendix A-1-a) with the aggrieved person's rights and responsibilities letter and other relevant documents. If the aggrieved person requests mediation, the EEO Counselor will complete an *Initial Interview Form*. The EEO Counselor will forward the *Request for Mediation Form* and the *Initial Interview Form* to the Mediation Coordinator.

The Mediation Coordinator will review the claims and coordinate with the Associate Administrator for Civil Rights, or his/her designee, to determine whether the Agency will offer mediation. When mediation is offered, it is mandatory for management to participate. In addition, the pre-complaint stage may be extended by an additional 60 days, but not exceed 90 days.¹

It is anticipated that the majority of EEO matters will be appropriate for mediation. However, there may be cases where the Associate Administrator for Civil Rights or his/her designee, in consultation with the Office of Chief Counsel and/or the Office of Human Resources, determines that mediation is not appropriate. This decision may be based on one or more of the following factors:

- (1) **Precedent.** The dispute involves significant legal or policy issues.
- (2) **Effect on Non-Parties.** The dispute significantly affects non-parties and there is a need for uniform treatment. For example, the claim(s) may have a nationwide impact or there may be lawsuits pending on similar claims and there is no legitimate reason to settle with only one party.

¹ Per Title 29, Code of Federal Regulations, Part 1614, all time periods relating to this part are calendar days unless otherwise stated.

(3) Fraud, Waste, Abuse, or Criminal Conduct. There is an indication that either party engaged in fraud, waste, abuse, or criminal conduct. Included in this category are cases of egregious misconduct (e.g., threats of violence or alleged assault), or other claims where compelling circumstances convince the Associate Administrator for Civil Rights, or his/her designee, that mediation would not be appropriate or worthwhile.

c. Mediation Offer. If mediation is offered, the Mediation Coordinator will provide the senior management official in the program office of the dispute a *Mandatory EEO Mediation Memorandum* (Appendix A-1-b). The senior management official will complete the *Mediation Scheduling Form* (Appendix A-1-C) by indicating the name(s) of the Agency participant(s) in the mediation session and the participants' dates of availability. The Agency participant(s) will also be required to review, sign, and date on the appropriate lines of the *Agreement to Mediate Form* (Appendix A-1-d). The *Agreement to Mediate Form* documents the parties' agreement to participate in mediation. The senior management official will be given 5-calendar days from his/her receipt of the *Mandatory EEO Mediation Memorandum* to provide the required forms to the Mediation Coordinator.

(1) Agreement to Mediate. After signatures and dates have been obtained by the Agency participants, the Aggrieved Person will be required to review, sign, and date the *Agreement to Mediate Form*. He/she will also be given 5-calendar days from his/her receipt of the *Agreement to Mediate Form* to provide the form to the Mediation Coordinator.

(2) Declining Mediation. If an aggrieved person declines mediation within 5-calendar days after it is offered and the mediation session has not been held, he/she will be referred back to the EEO Counselor by the Mediation Coordinator.

d. Coordination with Parties. Once a determination has been made that the parties have accepted the Agency's offer, all relevant forms and necessary information will be executed before the matter is scheduled for mediation. A letter containing the mediation location, time, date, mediator's name, and any other relevant information will be provided to the parties and their representatives prior to the mediation date.

e. Representation. Parties who raise EEO matters have the right to be accompanied, represented, and advised by a representative of their choice. The Mediation Coordinator will ascertain if either party will be represented and provide the appropriate notification to the parties and mediators.

(1) Agency Representatives. If an aggrieved person has an attorney as a representative, the Agency Official has a right to request that an attorney from the FHWA Office of Chief Counsel also participate in the session.

(2) Formal Complaint Stage. Mediation may be requested during the formal complaint stage of the EEO complaint process. To make complainants

aware of the availability of mediation during the formal complaint stage, the DOCR Compliance Operations Division will include a copy of the *Request for Mediation Form* along with the DOCR complaint Acceptance Letter to the complainant or his/her representative. Appropriate DOCR staff will forward all Requests for Mediation obtained from complainants or their representatives to the Mediation Coordinator for processing in accordance with the procedures established for mediation offers during the pre-complaint stage.

2-2. SELECTION OF MEDIATORS.

- a. Selection of Mediators.** The Mediation Coordinator will coordinate assignment of mediators for sessions.

2-3. THE MEDIATION PROCESS.

- a. Scheduling the Mediation.** The Mediation Coordinator will coordinate and schedule mediation time(s) and location(s) with the parties. Mediation will be conducted in a neutral location.
- b. Pre-mediation Discussions.** Prior to mediation, the Mediation Coordinator or the designated mediator may answer any questions and advise the parties regarding the mediation process.
- c. Preparation.** Parties should come to the mediation prepared to discuss the claim(s) in the dispute and potential ways of resolving the dispute. When appropriate, the Agency Official should coordinate settlement option(s) prior to the mediation with the Office of Chief Counsel and/or the Office of Human Resources to ensure the resolution options are in accordance with laws, regulations, and FHWA policies; and, that the terms can be implemented within a reasonable timeframe.
- d. Mediation Session.** The mediator will establish the rules of conduct for the session. The mediator may call for separate caucuses with each party or a party may request a caucus with the mediator. Some disputes are resolved in one mediation session. In others, additional sessions may be scheduled if progress is being made, but resolution has not been reached. If it is clear that no resolution is possible, mediation will be terminated. Either party is free to withdraw from the mediation at any time.
- e. Confidentiality.** The mediator shall discuss confidentiality with the parties in accordance with the provisions of the ADRA and other applicable Federal laws.
- f. Coordination of Resolution Terms.** Remedies available to resolve claims of discrimination will vary depending on the authority governing relief. If the mediation results in a potential resolution, the mediator will draft the terms and conditions agreed upon for review and concurrence. The Agency Official will coordinate all terms of the settlement agreement with the Office of Chief Counsel prior to the parties' signatures. If the resolution terms cannot be implemented as written, the mediator will coordinate changes with the parties or the Mediation Coordinator will arrange for another meeting between the parties and the mediator.
- g. Resolution.** If a resolution is reached, a settlement agreement will be prepared by the mediator. The settlement agreement will be signed by all parties and is binding on all parties (Appendix A-1-e). The mediator will provide the original settlement agreement to the Mediation Coordinator. The Mediation Coordinator will provide the original to the DOCR Compliance Operations Division, provide a copy to the parties, and maintain a copy for the Office of Civil Rights.

- h. No Resolution.** If there is no successful resolution, the mediator will notify the Mediation Coordinator. The Mediation Coordinator will take appropriate action to ensure that the aggrieved person/complainant continues in the EEO complaint process in accordance with Title 29, Code of Federal Regulations, Part 1614.
 - i. Evaluation.** Upon completion of the mediation session, the mediator will encourage the parties to complete an *Exit Survey* (Appendix A-1-f) and forward it to the Mediation Coordinator. The Mediation Coordinator will use the survey to evaluate the Mediation Program. The parties are encouraged to complete and forward the survey at a later time to the Mediation Coordinator if they prefer not to complete it at the end of the mediation session.

2-4. POST-MEDIATION.

- a. Execution of the Terms of the Settlement Agreement.** The parties who sign the settlement agreement (i.e., the designated Agency Official, and/or the aggrieved person/complainant) 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 settlement agreement being signed by the parties.
- b. Administration of the Settlement Agreement.** The Associate Administrator for Civil Rights, or his/her designee, will monitor compliance with settlement agreements reached as a result of mediation.
- c. Breach of Settlement Agreements.** If the aggrieved person/complainant believes that the FHWA has failed to comply with the terms of the settlement agreement, he/she shall notify the DOCR Compliance Operations Division. Notice must be in writing and submitted within 30 days of the date when the aggrieved person/complainant knew, or should have known, of the alleged noncompliance. The aggrieved person/complainant may request that the terms of the settlement agreement be specifically implemented, or alternatively, that the claims(s) be reinstated for further action from the point the complaint processing ceased. In the event the aggrieved person/complainant alleges noncompliance and chooses to reinstate his or her claims of discrimination, his/her requests for reinstatement restores the status quo, requiring that he/she return in full to the FHWA any relief that has been provided.
- d. Appeal Rights.** Appeal rights are defined in Title 29, Code of Federal Regulations, Part 1614.504(b) as the following:

The agency [*DOCR Compliance Operations Division*] shall resolve the matter and respond to the complainant [*or aggrieved person*], in writing. If the agency has not responded to the complainant, in writing, or if the complainant is not satisfied with the agency's attempt to resolve the matter, the complainant may appeal to the Commission [*U.S. Equal Employment Opportunity Commission*] for a determination as to whether the agency has complied with the terms of the settlement agreement or final decision.

The complainant 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 complainant 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.

CHAPTER 3. USE OF MEDIATORS

3-1. MEDIATORS' STANDARDS OF CONDUCT. Mediators will adhere to the *Model Standards of Conduct for Mediators (adopted in 2005)* (Appendix D) jointly published by the American Arbitration Association, the American Bar Association, and the Society of Professionals in Dispute Resolution.

3-2. ROSTER OF ELIGIBLE MEDIATORS. The FHWA will use the services of: 1) a contract mediation firm, 2) the Department's Center for Alternative Dispute Resolution, 3) the Federal Executive Board, or 4) other resources to obtain mediators.

The Mediation Coordinator will maintain a roster of mediators from the Department's Center for Alternative Dispute Resolution, the Federal Executive Board, or other resources who are appropriately trained and possess the skills necessary to conduct mediations. Parties undergoing mediation cannot use the roster to choose their mediator.

FEDERAL HIGHWAY ADMINISTRATION

**MEDIATION PROGRAM
FOR THE
EEO COMPLAINT PROCESS**

REQUEST FOR MEDIATION

I request that my EEO matter be considered for mediation. I understand that the Agency is not offering mediation, and that I may not elect mediation until such offer is made. I further understand that the Agency will consider my request and make an assessment of the matter to determine if mediation is appropriate. If the Agency offers mediation, at that time, I will have 5-calendar days to make an election to participate in the mediation process. If however, I choose not to elect mediation, I may continue processing my EEO matter in accordance with 29 CFR Part 1614.

Aggrieved Person/Complainant

Date

Aggrieved Person/Complainant's Representative

Date

This request will be forwarded to the FHWA's Mediation Coordinator.



U.S. Department of
Transportation
Federal Highway
Administration

Memorandum

CONFIDENTIAL

Subject: **ACTION:** Mandatory EEO Mediation with _____

Date: _____

From: _____
Mediation Coordinator
Office of Civil Rights

Reply
to Attn.
of: HCR-40

To: _____

In an effort to resolve Equal Employment Opportunity (EEO) complaints in an informal, less adversarial, and more expeditious manner, the Equal Employment Opportunity Commission (EEOC) requires agencies to make Alternative Dispute Resolution available to employees. The FHWA has established a Mediation Program to encourage parties who have a dispute to try to resolve it through mediation. Mediation provides an opportunity for the individuals to discuss their issues directly with each other and explore opportunities for a mutually satisfactory resolution.

On _____, _____ elected mediation in an attempt to resolve an EEO issue with _____. The FHWA Office of Civil Rights has reviewed _____'s allegation and determined mediation is appropriate. The FHWA is offering mediation at this time; therefore, _____ is required to participate. The nature of _____'s dispute is outlined below:

- Basis(es): _____
- Issue(s): _____
- Proposed Remedy: _____

As the senior management official (i.e., Associate Administrator, Division Administrator, Director of Field Service, etc.) in the program office involved, you should discuss the EEO matter with _____ and determine who will serve as the Agency Official for the mediation session. The Agency Official is the individual who serves on behalf of the FHWA.

This individual has the authority to grant or deny relief, or has access to those in authority who may grant or deny the requested relief. The individual may be yourself, the manager named in the dispute, or another official designated by you.

If resolution is reached, the terms will be reduced in writing into a settlement agreement. The settlement agreement will be signed by and is binding by both parties. If no agreement is reached, _____ may continue in the EEO complaint process.

It is advantageous to attempt mediation now, at the early stage, before positions harden and large expenditures of time and money have occurred. Many EEO complaints are based on miscommunication between the parties. Mediation offers the opportunity to communicate directly and listen to each other's real concerns. Experience has shown that many of the EEO complaints submitted for mediation are resolved. Even when a case is not resolved, mediation may be helpful in clarifying issues.

The mediators are not advocates for either party nor do they render any decisions. They will facilitate communication between both parties, help each side gain a clearer perspective of the situation, and assist both parties in developing mutually satisfactory options for resolving the issues.

Additional information regarding mediation can be found in the Department's brochure entitled, "Participating Effectively in Mediation: A Guide for DOT Managers in EEO Cases" (copy attached).

Please complete the attached "Mediation Scheduling" form and return it to me by e-mail (thalia.williams@dot.gov) within **five (5) calendar days** of your receipt of this memorandum. In addition, please have the person(s) who will participate in the mediation session sign/date the respective areas on the attached "Agreement to Mediate" form and return it to me by e-mail. Upon receipt of your forms, I will contact the parties to schedule the mediation session.

Should you have any questions concerning this request, please contact me at 202-366-1595.

CC: _____

3 Attachments

- Mediation Brochure for Managers
- Mediation Scheduling Form
- Agreement to Mediate Form

MEDIATION SCHEDULING FORM

Please use this form to: 1) identify the agency participants in the session, and 2) provide a list of dates agency participants are available for the session.

The FHWA's Mediation Coordinator will coordinate with the aggrieved person/complainant to schedule the mediation session upon receipt of this form.

AGENCY PARTICIPANTS

(Agency Official)
(Name and Title)

(Agency Representative)
(Name)

(Supervisor/Manager/Team Leader)
(Name and Title)

(Other)
(Name and Title)

Agency Official: This individual serves on behalf of the FHWA. The individual has the authority to grant or deny relief, or has access to those in authority who may grant or deny the requested relief. The individual may be the senior management official (i.e., Associate Administrator, Division Administrator, Director of Field Service, etc.) in the program office involved, or another official designated by the senior management official. NOTE: If a senior management official is named in the dispute, it is mandatory that he/she participates in the session as the Agency Official.

Agency Representative: This individual (e.g., attorney) represents the FHWA and advises the Agency Official regarding laws, regulations, and policies that govern resolution terms.

Supervisor/Manager/Team Leader: This individual may or may not be the manager named in the dispute and is not identified as the Agency Official. The individual may be the first-level manager of an aggrieved person/complainant (or an employee named in a harassment claim).

Other: This individual may be an employee named in a harassment claim.

DATES OF AVAILABILITY

(Provide a list of dates from _____ to _____, 2011)

1. _____
2. _____
3. _____
4. _____
5. _____

6. _____
7. _____
8. _____
9. _____
10. _____

**FEDERAL HIGHWAY ADMINISTRATION
MEDIATION PROGRAM FOR THE EEO COMPLAINT PROCESS**

AGREEMENT TO MEDIATE FORM

This agreement is between _____
(Aggrieved Person/Complainant)

and

(Affected FHWA Office)

represented by _____
(Agency Official)

The parties agree to enter into mediation with the intent of reaching a mutually agreeable resolution of the dispute [*presented to the EEO Counselor on date of initial contact or filed formally on filings date of complaint*]. The following are the basis(es) and issue(s) to be mediated by the parties:

Basis(es):

Issue(s):

Designation of Representative:

The aggrieved person/complainant has a right to obtain a representative of his/her choice throughout the EEO complaint process. The aggrieved person/complainant designates the following individual as his/her representative for the purpose of this mediation:

Name of Aggrieved Person/Complainant's Representative _____

Phone number _____

E-Mail address _____

Provisions of the Agreement and Signatures:

1. **Pre-complaint Stage:** By signing this document, the parties agree that the pre-complaint stage is extended by 60-calendar days from the date the aggrieved person requested an EEO Counselor. The total EEO counseling period may not exceed 90-calendar days from the date the aggrieved person requested an EEO Counselor.
2. Mediators are neutral third parties who will assist the parties in reaching a resolution. Mediators will not make judgments or impose a resolution.
3. Mediators do not offer advice, nor do they 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 following page and requires all parties' signatures.
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. If one or both parties decide to withdraw from the mediation, the parties will be encouraged to discuss their decision in the presence of the other party and the mediator(s).
7. If the mediator(s) determines that it is not possible to resolve the dispute through mediation, the mediator(s) can terminate the process once it has been conveyed to the parties.
8. If agreement is reached, the mediator(s) will prepare a settlement agreement that will be signed and binding by the parties.
9. By entering into a settlement agreement, the aggrieved person/complainant agrees that the issue(s) raised which formed the basis of the dispute are resolved, withdrawn, and no longer serve as the basis of a complaint against the Agency or its agents.
10. If there is no resolution, the aggrieved person/complainant will be referred back to the Mediation Coordinator to continue in the EEO complaint process.

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

Aggrieved Person/Complainant	Date	Aggrieved Person/Complainant's Representative	Date
Agency Official	Date	Agency Official's Representative	Date
Supervisor/Manager/Team Leader	Date		
Lead Mediator	Date	Co-Mediator	Date

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 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 settlement 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., U.S. Equal Employment Opportunity Commission hearing) or judicial (e.g., suite 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 right to object to the 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 Settlement Agreement. Sections "a" and "b" will not apply where necessary to comply with a settlement agreement reached as a result of mediation or to document compliance with such an 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.

Confidentiality Clause:

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.

Aggrieved Person/Complainant

Date _____

Aggrieved Person/Complainant's Representative

Date _____

Agency Official

Date _____

Agency Official's Representative

Date _____

Supervisor/Manager/Team Leader

Date _____

Lead Mediator

Date _____

Co-Mediator

Date _____

Settlement Agreement

1. This settlement agreement (agreement) is voluntarily entered into between the Federal Highway Administration, a modal administration of the U.S. Department of Transportation ("Agency") and (Name of Aggrieved Person/Complainant) ("Aggrieved"/"Complainant") to resolve the following dispute(s): DOT Complaint No. _____ or the matter(s) raised with the EEO Counselor on (date of initial contact), as specified in this paragraph.

[NOTE: If mediation held during the formal stage, remove "raised with the EEO Counselor on (date of initial contact)" text and insert "raised in the formal EEO complaint filed on (date)".]

The Aggrieved/Complainant alleged that he/she was discriminated against when:

- a.
 - b.
 - c.
2. The Agency shall:
[Insert any agreements/promises of action, including the time by which the action is to be taken.]
 - a.
 - b.
 - c.
 3. The Aggrieved/Complainant shall:
[Insert any agreements/promises of action, including the time by which the action is to be taken.]
 - a.
 - b.
 - c.
 4. The Aggrieved/Complainant agrees that by signing this agreement, his/her allegation(s) set forth in paragraph 1 above are withdrawn.
 5. The Aggrieved/Complainant agrees not to initiate a complaint(s), grievance(s), civil lawsuit(s) or claim(s) of any type with regard to the allegation(s) resolved in this agreement.

6. The Aggrieved/Complainant affirms that he/she is entering into this agreement freely, with full knowledge and understanding of its terms and conditions, and without any coercion or duress on the part of the Agency, its officers, representatives, or employees.
7. The parties agree not to disclose this agreement or any matters discussed during mediation, except to those who have a need to know in an official capacity.
8. The parties agree that the terms and conditions set forth in this agreement form the complete and final basis for settlement.
9. This agreement does not constitute an admission of discrimination, reprisal or wrongdoing on the part of the Agency, its officials, representatives, or employees. Rather, this agreement reflects the parties' interest in resolving the allegation(s) identified above.
10. This agreement does not establish any precedent and may not be cited in any other proceeding, except a proceeding addressing the enforcement of this agreement.
11. In accordance with 29 C.F.R. 1614.504, if the Aggrieved/Complainant believes that the Agency has failed to comply with the terms of the agreement, he/she shall timely notify, in writing, within 30 days of when he/she knew or should have known of the alleged noncompliance:

Associate Director
Compliance Operations Division
Departmental Office of Civil Rights
1200 New Jersey Avenue, SE., W76-401
Washington, DC 20590
Phone: (202) 366-9370
Toll Free: (866) 355-7147
Fax No: (202) 493-2064
TTY: (202) 366-0663

NOTE: FOR AGE DISCRIMINATION COMPLAINTS, STATUTE AND REGULATIONS REQUIRE THAT THE FOLLOWING CLAUSES BE INCLUDED IN THE AGREEMENT:

12. By signing this agreement, the Aggrieved/Complainant understands that he/she is waiving any and all existing rights and claims he/she has raised under the Age Discrimination in Employment Act (ADEA), as amended, 29 U.S.C. §§621-634, and section 717 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-16, but is not waiving any future rights or claims under the ADEA or Title VII of Civil Rights Act of 1964 for actions arising after the date he/she signs this agreement.
13. The Aggrieved/Complainant is aware of his/her right to representation by an attorney and is advised to have an attorney review the agreement before signing it.
14. The Aggrieved/Complainant agrees that he/she has been afforded ample opportunity to consult with an attorney concerning the terms and conditions of this agreement.

15. The Aggrieved/Complainant acknowledges having been given a reasonable amount of time to review the terms and conditions of this agreement before signing it.
16. The Aggrieved/Complainant has seven (7) days following the signing of this agreement within which to revoke the agreement by written rescission addressed to the counsel for the Agency or the EEO Program Manager. This agreement shall not become effective or enforceable until the revocation period has expired.

(Aggrieved Person/Complainant)

(Date)

(Aggrieved Person/Complainant's Representative)

(Date)

(Agency Official)

(Date)

(Agency Representative)

(Date)

EXIT SURVEY FOR MEDIATION PARTICIPANTS

NOTE: Upon completion of the mediation session, the parties are encouraged to complete this survey. The survey will be used to evaluate the Federal Highway Administration's *Mediation Program for the Equal Employment Opportunity (EEO) Complaint Process*. If the parties prefer not to complete the survey at the end of the mediation session, the parties are encouraged to complete and forward the survey at a later time to the Mediation Coordinator: Office of Civil Rights, DOT/FHWA, 1200 New Jersey Avenue, SE., Room E81-322, Washington, DC 20590.

Date(s) of session: _____

Session location: _____

Mediator(s) name: _____

1. What was your role in the case?

- (a) Aggrieved person
- (b) Complainant
- (c) Agency Official (respondent)
- (d) Manager/Supervisor/Team Leader (respondent)
- (e) Representative for aggrieved person/complainant
- (f) Representative for management (respondent)

2. What is your grade level? _____

3. If you had a representative during the mediation, was your representative a:

- (a) Fellow employee
- (b) Attorney
- (c) Other (please specify): _____
- (d) Did not have representative

4. What was the basis(es) of the EEO complaint in this case? Circle all that apply.

- | | | |
|---------------------|-------------------------|------------------------|
| (1) Race | (5) Disability | (9) Sexual orientation |
| (2) Color | (6) Religion | (10) Retaliation |
| (3) National origin | (7) Age | |
| (4) Sex | (8) Genetic Information | |

5. On what date did the dispute begin? _____

6. Please circle or describe the cause of the action of the dispute.

- (a) Promotion
- (b) Non-selection
- (c) Performance Rating
- (d) Disciplinary Action
- (e) Sexual Harassment
- (f) Other (please describe): _____

7. Please describe the relief requested in the dispute prior to mediation.

8. How long was this mediation session? _____ (number of hours)

9. During the mediation, did you learn about the other party's view?

- (a) Yes
- (b) No

10. During the mediation session, did the other party learn about your view?

- (a) Yes
- (b) No

11. Did the mediation result in a settlement agreement?

- (a) Yes – **Skip to question 13**
- (b) No
- (c) Partially

12. If the mediation failed to result in a settlement agreement or resulted in a partial settlement, were there positive outcomes (such as, a better understanding of the issue or a better communications between the parties) that made it worthwhile?

- (a) Yes (please specify): _____

- (b) No

13. Thinking about your most recent mediation session, please assess the mediator's performance in the following areas:

(Circle one number on each line to indicate your rating)

The mediator.....

Poor Fair Good Excellent

a. inquired into facts of the complaint impartially	1	2	3	4
b. understood issue(s) of the complaint	1	2	3	4
c. assisted the parties with generating realistic options	1	2	3	4
d. clarified the issue(s) of the complaint	1	2	3	4
e. gained the confidence and trust of the parties	1	2	3	4
f. handled emotional issues satisfactorily	1	2	3	4
g. maintained effective manner (calm, sensitive, empathetic, flexible, purposeful)	1	2	3	4
h. inspired confidence in the mediation process	1	2	3	4
i. honored confidentiality	1	2	3	4

14. Thinking about your experience with mediation overall, please indicate your feelings about the following statements:

(Circle one number on each line to indicate your rating)

	Strongly Disagree	Somewhat Disagree	Neither	Somewhat Agree	Strongly Agree
a. You received sufficient information about mediation	1	2	3	4	5
b. You were comfortable with the session environment	1	2	3	4	5
c. The mediation was fair	1	2	3	4	5
d. Your level of participation in the mediation was sufficient	1	2	3	4	5
e. Your views were addressed satisfactorily	1	2	3	4	5
f. The mediator helped clarify your goals	1	2	3	4	5

15. Have you ever been through the EEO complaint process before?

(a) Yes

(b) No – Skip to question 20

16. How many times have you been through the EEO complaint process? _____

17. Please circle the highest level of any of your prior EEO complaint activity:

- (a) Pre-complaint (EEO counseling or mediation)
- (b) Formal Complaint
- (c) Final Agency Decision
- (d) EEOC Hearing
- (e) Court Decision

18. How did time in mediation relate to time in the EEO complaint process?

- Mediation took:**
- (a) much less time
 - (b) less time
 - (c) the same amount of time
 - (d) more time
 - (e) much more time

19. Did mediation save you resources when compared to pursuing the complaint through the EEO complaint process?

- (a) Yes
- (b) No

20. Have you participated in the FHWA's Mediation Program before?

- (a) Yes
- (b) No

If yes, how many times? _____

21. Would you participate in mediation again?

- (a) Yes
- (b) No

22. Do you have additional comments or suggestions to improve the FHWA's Mediation Program?

Thank you!

RELATED PUBLICATIONS

1. STATUTES.

- (a) Title VII of 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.
- (b) The Age Discrimination in Employment Act of 1967 prohibits discrimination in employment based on age when the employee is at least 40 years old.
- (c) The Equal Pay Act prohibits discrimination in payment of wages based on sex (gender).
- (d) The Rehabilitation Act of 1973 prohibits discrimination in employment on the basis of physical or mental disability.
- (e) Title II of the Genetic Information Nondiscrimination Act of 2008 prohibits discrimination in employment on the basis of genetic information.
- (f) 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 a proceeding.
- (g) Title 5 of the United States Code, Chapter 5, Subchapter IV, Alternative Means of Dispute Resolution in the Administrative Process, as amended, (see Appendix C).
- (h) Title 49, United States Code, Chapter 102, Department of Transportation (Presidential Appointees).

2. REGULATIONS.

- (a) Title 29, Code of Federal Regulations (CFR), Part 1614 (Federal Sector Equal Employment Opportunity) governs processing complaints of Federal employment discrimination.
- (b) Title 49, CFR, Part 1.23(a), Subtitle A, Office of the Secretary of Transportation Spheres of Primary Responsibility for the overall planning, direction, and control of Departmental affairs including civil rights, contract appeals, small and disadvantaged business participation in departmental programs, etc.
- (c) 65 Federal Register 83085, December 29, 2000, Confidentiality in Federal ADR Programs.

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, disability, age, or sexual orientation.

4. MANAGEMENT DIRECTIVES.

Equal Employment Opportunity Commission's *Equal Employment Opportunity Management Directive-110, Federal Sector Complaints Processing Manual* provides guidance on processing complaints of Federal employment discrimination.

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

§ 571. Definitions

For the purpose of this subchapter:

- (1) "Agency" has the same meaning as in section 551(1) 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 of 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 resolve an issue in controversy in which a neutral is appointed and specified parties participate.
- (7) "In confidence" means, with respect to information, that is provided:
 - a. with the expressed intent of the source that is not to 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.
- (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.
 - (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 a 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.
 - (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 communication 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 communication 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.
- (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) 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.
- (1) 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 a 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).

MODEL STANDARDS OF CONDUCT FOR MEDIATORS¹

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, uncoerced 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, it is a good practice for the mediator to make the

¹ 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.

parties aware of the importance of consulting other professionals, where appropriate, to help them make informed decisions.

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 he/she 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 himself/herself as available to serve as a mediator gives parties and the public the expectation that he/she 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 Reasonable Expectations of the Parties with Regard to Confidentiality.

The reasonable expectation 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.
- 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 mediation.

COMMENTS:

- A mediator may agree to mediate only when he/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 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 mediation when incapable of serving or when unable to remain impartial.
- A mediator shall withdraw from 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. Advertising and Solicitation: A Mediator Shall be Truthful in Advertising and Solicitation for Mediation

Advertising or any other communication with the public concerning services offered or regarding the education, training, and expertise of the mediator shall be truthful. Mediators shall refrain from promises and guarantees of results.

COMMENTS:

- It is imperative that communication with the public educate and instill confidence in the process.
- In an advertisement or other communication to the public, a mediator may make reference to meeting State, National, or private organization qualifications only if the entity referred to has a procedure for qualifying mediators and the mediator has been duly granted the requisite status.

VIII. Fees: A Mediator Shall Fully Disclose and Explain the Basis of Compensation, Fees, and Charges to the Parties.

The parties should be provided sufficient information about fees at the outset of a mediation to determine if they wish to retain the services of a mediator. If a mediator charges fees, the fees shall be reasonable, considering among other things, the mediation service, the type and complexity of the matter, the expertise of the mediator, the time required, and the rates customary in the community. The better practice in reaching an understanding about fees is to set down the arrangements in a written agreement.

COMMENTS:

- A mediator who withdraws from mediation should return any unearned fee to the parties.
- A mediator should not enter into a fee agreement which is contingent upon the result of the mediation or amount of the settlement.
- Co-mediators who share a fee should hold to standards of reasonableness in determining the allocation of fees.
- A mediator should not accept a fee for referral of a matter to another mediator or to any other person.

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
740-15th Street, NW
Washington, DC 20005-1009

Society of Professionals in Dispute Resolution
815-15th Street, NW
Washington, DC 20005

SAMPLE

Sharing Neutrals
Standards of Practice
Mediator Agreement

I have read the Sharing Neutrals Mediator Qualifications and Standards of Practice dated January 7, 2000. I agree to uphold the Standards of Practice. In addition, I have read and understand the confidentiality provisions of the Alternative Dispute Resolution Act of 1996.

I pledge to uphold these ethical principles as a Sharing Neutrals mediator.

(Signature)

Name (please print)

Date

Please forward original to the FHWA's Mediation Coordinator.

**U.S. Department of Transportation
Federal Highway Administration
Office of Civil Rights (HCR-40)
1200 New Jersey Avenue, SE, Room E81-322
Washington, DC 20590**