

Mediating by the “Numbers”

Using the Standards/Rules of Conduct for Mediators and Lawyers in creating successful mediated outcomes.

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MEDIATION. ARBITRATION. PEACEMAKING.

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Mediation. Arbitration.
Peacemaking.

A Key Development [2025] in Pennsylvania

PENNSYLVANIA BAR ASSOCIATION ALTERNATIVE DISPUTE RESOLUTION COMMITTEE

Recommendations

That the Pennsylvania Bar Association:

1. adopt the Model Standards of Conduct for Mediators;
2. encourage its members and all practicing mediators in Pennsylvania to adhere to the professional and ethical standards set forth in the Model Standards of Conduct for Mediators; and
3. take appropriate steps to disseminate and promote the Model Standards of Conduct for Mediators among its members, Pennsylvania courts and judiciary, the Pennsylvania Legislature, the Governor of Pennsylvania, local Pennsylvania bar associations, and the public.

The PBA has recently adopted the Model Standards of Conduct for Mediators. The Standards were previously adopted by the American Arbitration Association (AAA), American Bar Association and the Association for Conflict Resolution. The PBA encourages all practicing mediators in Pennsylvania to adhere to the professional and ethical standards set forth in the Model Standards, including but not limited to its members.

Kristen Hamilton

PBA President

Model Standards of Conduct for Mediators

- Prepared 1994 by American Arbitration Association, American Bar Association's Section for Dispute Resolution, Association for Conflict Resolution
 - Revised 2005 by joint committee of representatives from successor organizations
- Each participating organization approved the original 1994 version and the 2005 revision

Model Standards of Conduct for Mediators

The PBA Approve the recommendation of the Alternative Dispute Resolution Committee that PBA adopt the Model Standards of Conduct for Mediators by encouraging members and all practicing mediators in Pennsylvania to adhere to the professional and ethical standards set forth in the Model Standards of Conduct for Mediators and to take appropriate steps to disseminate and promote the Model Standards of Conduct for Mediators among its members, Pennsylvania courts and judiciary, the Pennsylvania Legislature, the Governor of Pennsylvania, local Pennsylvania bar associations, and the public. (May 2025)



Unique Pathway for Mediation in Pennsylvania

- History: Decision to promote process over regulation
- Initial Oversell (**Kool-Aid**) *"Litigation is Dead!"*
- Contractual imperatives [i.e., AIA Forms]
- Progress in law/dispute resolution developments takes time
- **From Resistance** to sudden **embracing** from Bench/Bar?
- Mediation is "In the water" in more experienced [evolved?] jurisdictions
- Not always done well *"...case settled, but dispute remains"*
- Absent Court directive, Mediation is still here, in "pockets"
- Are we at a "Tipping Point" for mediation in Pennsylvania?

Why endorse Standards last updated twenty years ago?

- Remember “Unique Pathways in Pennsylvania”
- How to organically advance and encourage adoption and recognition of proper process in Mediation
- Legal Profession is Rules centered
- Many Lawyers using mediation, and too many self identified “mediators” are not aware there are Rules for mediators
- Understanding the **Rules of Conduct for Mediators** should help participants navigate selection, preparation and participation in best process for the challenges at hand

System Two Thinking

Engaging. Thought, reflection and analysis. Takes longer than System 1. Is accurate but often requires reflection after System 1.

Prefrontal Cortex

Thinking/logic/ what to do/ evaluation.

Thinking it through.

Let me sleep on it.

Hippocampus

Regulates memory and emotions.

System One Thinking

Quick. Certain. Often inaccurate, but highly confident.

Amygdala

Turns on fight or flight, and stores memories of the event.

Fight Flight Freeze

Effective Conflict Resolution involves recognition of neurological and psychological drivers, and the respective roles of the participants

So mad you can't think straight?

"Seeing red"?

Human Brain as Predictive machine...*"I know where this is going!!" [Eye rolls, body language]*

Neutrals model... constructive listening.

Never underestimate the importance of [actually]being/feeling heard...

Bringing Oxytocin into the Room: Notes on the Neurophysiology of Conflict...Ken Cloke 12/19/2009

Did you know that mediators need 20/20 peripheral vision?

Why ADR – and in particular Mediation?

- Docket Pressure
- Litigation expense
- Litigation uncertainty
- *CONTROL; Efficiency*
- Conflict factors not well addressed by litigation
- It works...in the right place...**done the right way**

Mediation

- A Neutral acts to encourage and facilitate resolution of dispute, without prescribing what the resolution should be
- Informal process, helps disputing parties reach mutually acceptable agreement
- Mediator's (Neutral's) role:
 - Reduce obstacles in communication
 - Assist identifying issues, explore alternatives
 - Facilitate voluntary agreement
 - ***Ultimate decision-making power rests with parties***

Yes, I went down the AI Rabbit Hole

- **The parallel core principles linking attorney and mediator ethics focus heavily on maintaining integrity, avoiding conflicting interests, protecting party information, and ensuring complete honesty.**



Informed Autonomy vs. Self-Determination

Attorneys: Under PA RPC 1.2, the client retains the ultimate authority over the substantive goals and final settlement choices of their case.

Mediators: Under Standard I, the core foundation of mediation is party **self-determination**, meaning the commercial participants control the final outcome, completely independent of the mediator's influence.



Nine Standards [In no particular order😊]

- I Self-Determination
- II Impartiality
- III Conflicts of Interest
- IV Competence
- V Confidentiality
- VI Quality Of The Process
- VII Advertising and Solicitation
- VIII Fees and Other Charges
- IX Advancement of Mediation Practice

Standard I: Self-Determination

I. A. A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, un-coerced decision in which each party makes free and informed choices as to process and outcome.

Standard I: Self-Determination

- Parties may exercise self-determination at all stages of a mediation:
 - Mediator (Neutral) selection
 - Process design
 - Participation in – or withdrawal from – process
 - Outcomes

Self-Determination...to a point

- Mediator may need to balance party self-determination with the duty to conduct a quality, efficient process in accordance with the Standards
- Mediator can't personally ensure parties are making free, informed choices – but can make parties aware of the importance of consulting other professionals to help inform their decisions.

Standard I: Self-Determination

“Keeping Score”?

A mediator shall not undermine party self-determination by any party for reasons such as higher settlement rates, egos, increased fees, or outside pressures from court personnel, program administrators, provider organizations, the media, or others.

Competence

Standard IV: Competence

- *A mediator shall mediate only when the mediator has the necessary competence to satisfy the reasonable expectations of the parties*
- *A mediator should attend educational programs and related activities to maintain and enhance the mediator's knowledge and skills related to mediation.*

RPC 1.1 Competence

- A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation...

Maintaining Competence

- 8. To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject...

Standard IV: Competence

A mediator should have available for the parties information relevant to the mediator's training, education, experience and approach to conducting a mediation

If a mediator, during the course of a mediation determines that the mediator cannot conduct the mediation competently, the mediator shall discuss that determination with the parties as soon as is practicable and take appropriate steps to address the situation, including, but not limited to, withdrawing or requesting appropriate assistance

Standard VI: Quality of the Process

A mediator shall conduct a mediation in accordance with these Standards and in a manner that promotes diligence, timeliness, safety, presence of the appropriate participants, party participation, procedural fairness, party competency and mutual respect among all participants

The presence or absence of persons at a mediation depends on the agreement of the parties and the mediator. The parties and mediator may agree that others may be excluded from particular sessions or from all sessions

Standard VI: Quality of the Process

A mediator should promote honesty and candor between and among all participants, and a mediator shall not knowingly misrepresent any material fact or circumstance in the course of a mediation

A mediator shall not conduct a dispute resolution procedure other than mediation but label it mediation in an effort to gain the protection of rules, statutes, or other governing authorities pertaining to mediation

Standard VI: Quality of the Process

A mediator shall not undertake an additional dispute resolution role in the same matter without the consent of the parties. Before providing such service, a mediator shall inform the parties of the implications of the change in process and obtain their consent to the change. A mediator who undertakes such role assumes different duties and responsibilities that may be governed by other standards.

Standard VI: Quality of the Process

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

Standard VI: Quality of the Process

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

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

Standard IX: Advancement of Mediation Practice

A mediator should act in a manner that advances the practice of mediation.

- Such as:
 - Fostering diversity within the field of mediation.
 - Striving to make mediation accessible to those who elect to use it, including providing services at a reduced rate or on a pro bono basis as appropriate.
 - Participating in research when given the opportunity, including obtaining participant feedback when appropriate.
 - Assisting newer mediators through training, mentoring and networking.

Standard IX: Advancement of Mediation Practice

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

RPC 1.0(e)

Informed Consent

“Informed consent” denotes the consent by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

RPC 1.0(e)

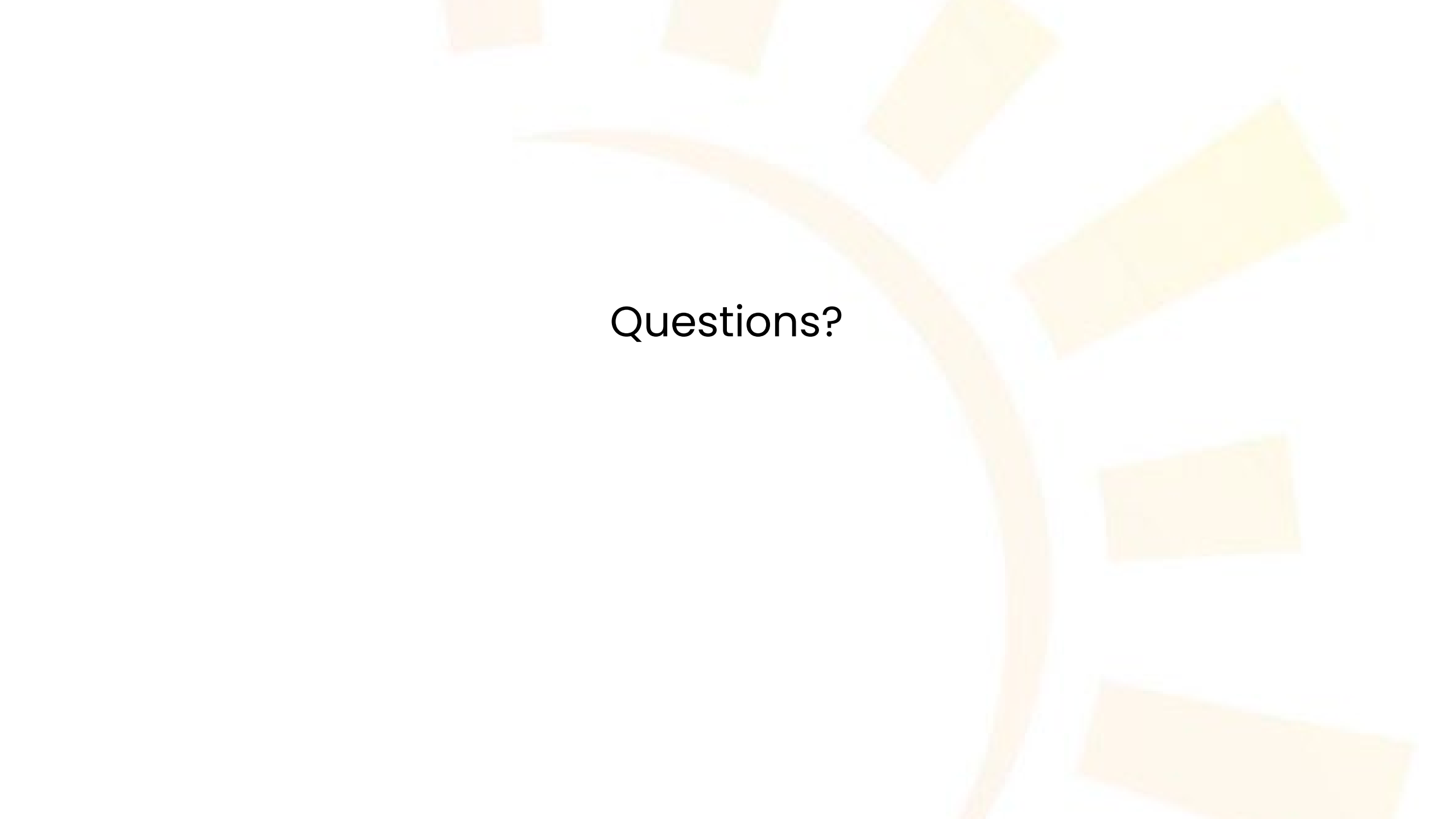
Informed Consent

The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent.

The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision.

Ordinarily, this will require communication that includes:

- a disclosure of the facts and circumstances giving rise to the situation,*
- any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and*
- a discussion of the client's or other person's options and alternatives.*



Questions?