

IN THE SUPREME COURT OF THE STATE OF KANSAS

FILED

Administrative Order No. 110

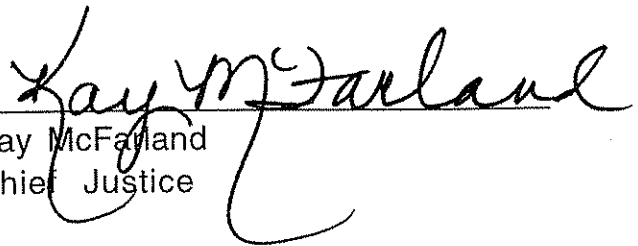
MAR 11 2 22 PM '95

Re: Rules for Dispute Resolution.

CAROL G. GREEN
CLERK APPELLATE COURTS

The attached Supreme Court Rules 902-904 are hereby adopted.

ADOPTED BY ORDER OF THE COURT this 16th day of February, 1996.



Kay McFarland
Chief Justice

Attachment

Mailed to West
T. Miner
3-11-96

RULE 902

MEDIATOR and MEDIATOR TRAINER QUALIFICATIONS

(a) The qualifications for mediators and trainers apply to individuals who handle cases referred by the state courts or under K.S.A. 5-501 et seq. No standards or qualifications should be imposed upon any person chosen and agreed to by the parties. These qualifications should not prevent parties having free choice of process, program and the individual neutral.

(b) "Mediators" are defined as persons specifically trained in the process of mediation who assist parties in dispute to reach a mutually acceptable resolution of their conflict. The role of the mediator is to aid the parties in identifying issues, reducing misunderstandings, clarifying priorities, exploring areas of compromise, and finding points of agreement. The agreement reached by the parties shall be based on the decisions of the parties and not on the decisions of the mediator.

(c) The director of dispute resolution shall keep a list of approved mediators, trainers, and trainings, and shall review any requests for approval within 60 days of the receipt of the written application and materials required by the director.

(d) To be approved as a mediator, an applicant must:

1. Complete the required training for the types of cases the applicant wishes to receive approval to mediate, and
2. Sign an agreement to follow the ethical standards of Supreme Court rule 903, and
3. Co-mediate with or be supervised by an approved mediator for three cases or 15 hours during the first year of approved mediation practice after completing core training, and
4. Comply with Supreme Court Rule 904 concerning continuing mediator education.

(e) All approved mediators shall have participated in core mediation training of 16 hours. Training components must include conflict resolution techniques, neutrality, agreement writing, ethics, role playing,

communication skills, evaluation of cases, and the laws governing mediation. Initial training must be done in a continuous manner within a 120 day period. Core training enables the applicant to mediate disputes which may include, but are not limited to, neighborhood, community, victim/offender, small claims, education, farmer-lender, or public policy problems. In addition, applicants wishing to mediate certain types of cases must have additional training as specified below:

1. To mediate domestic disputes, the applicant must have 14 hours of mediation skill training and 10 hours of training in child development, family systems, psychological aspects of divorce, domestic violence, or related substantive areas in addition to core training.

2. To mediate parent/adolescent disputes, the applicant must have 4 hours of mediation skill training and 10 hours of training in child and adolescent development, family psychology, the parent-adolescent relationship, or related substantive areas in addition to core training.

3. To mediate general Chapter 60 cases of a non-domestic nature, the applicant must have 14 hours of mediation skill training and 10 hours of training related to the subject being mediated or the civil litigation system in addition to core training.

(f) In addition to the requirements set forth in (e)(1)(2)(3), a trainer of an approved course must have the following experience:

1. Three years practice of mediation, and
2. One year substantive experience in the subject area of the mediation training, and
3. Serving as an assistant or coach in three trainings with an approved trainer.

(g) Any training being conducted by an approved trainer may be monitored and evaluated by the director of dispute resolution.

(h) If an applicant has specialized experience or training but does not specifically meet the requirements set forth above, the applicant may apply to the director of dispute resolution for special approval.

(i) Mediator and trainer qualifications shall be reviewed by the

director of dispute resolution and the advisory council on dispute resolution on an annual basis. Any modifications shall be presented to the Supreme Court by December 31 of each year, beginning in 1996.

(j) Mediator and trainer qualifications shall go into full force and effect on July 1, 1996.

COMMENT

The qualifications for mediators and trainers are the result of over five years of study. Recommendations and suggestions were received from members of the Supreme Court ADR Committee, Heartland Mediators Association, Kansas Bar Association, National Institute for Dispute Resolution, Society for Professionals in Dispute Resolution, American Bar Association, Academy of Family Mediators, State Justice Institute, judges, mediators, therapists and various representatives from other states. These recommendations and suggestions were collated and modified to encompass the statutory mandates of K.S.A. 5-501, current mediator training occurring in Kansas, national trends for minimum requirements, and future needs.

Conditions, including the availability of individuals with mediation training and experience, will vary between rural and urban areas. The minimum qualifications are listed to give judges and approved centers a beginning point to establish local policy. Judges and centers are encouraged to add requirements as necessary for the type of case to be mediated and the availability of individuals with additional qualifications.

RULE 903

ETHICAL STANDARDS FOR MEDIATORS

PREFATORY COMMENT

Approximately three years ago, leaders of several organizations in the alternative dispute resolution (ADR) field discussed the need to establish formal guidelines for the conduct of mediators. The American Arbitration Association (AAA), the American Bar Association (ABA) and the Society of Professionals in Dispute Resolution (SPIDR) created a joint committee to draft standards that would serve as a general framework for mediators. John D. Feerick, Dean of the Fordham University School of Law, and a member of the AAA board, chaired the committee.

The function of the committee was to develop a set of standards to serve as a general framework for the practice of mediation. The effort was a step in the development of the field and a tool to assist practitioners in it--a beginning, not an end. The resultant Rule 903 developed primarily from the AAA/ABA/SPIDR efforts is intended to apply to all types of mediation. It is recognized, however, in some cases the application of these standards may be affected by laws or contractual agreements. Slight modifications to the AAA/ABA/SPIDR guidelines were made by the Advisory Council on Dispute Resolution and the director in order to comport with current Kansas law and practice.

Rule 903 is intended to perform three major functions: to serve as a guide for the conduct of mediators; to inform 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 they will serve an educational function and provide assistance to individuals, organizations, and institutions involved in mediation.

Mediation is a process in which an impartial third party--a mediator--facilitates the resolution of a dispute by promoting voluntary agreement (or "self-determination") by the parties to the dispute. A mediator facilitates communications, promotes understanding, focuses parties on their interests, and seeks creative problem solving to enable parties to reach their own agreement. These standards give meaning to this definition of mediation and are adopted as the standards for any person mediating a court-connected case not excluded by Rule 902, or a case falling under K.S.A. 5-501 et. seq.

(a) **Self-Determination:** A Mediator Shall Recognize Mediation Is Based on the Principle of Self-Determination by the Parties.

Self-determination is the fundamental principle of mediation. It requires the mediation process rely upon the ability of the parties to reach a voluntary, uncoerced agreement.

COMMENT

- 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 an opportunity to consider all proposed options.
- A mediator cannot personally ensure 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 parties aware of the importance of consulting other professionals, where appropriate, to help them make informed decisions.

(b) **Impartiality:** A Mediator Shall Conduct Mediation in an Impartial Manner.

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

COMMENT

- 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 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.

(c) **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 an association or relationship which might create an impression of possible bias. The basic approach to questions of conflict of interest is consistent with the concept of self-determination. A mediator has a responsibility to disclose all actual and potential conflicts reasonably known to the mediator and could reasonably be seen

as raising a question of impartiality. If all parties agree to mediate after being informed of conflicts, a mediator may proceed with 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 mediation.

COMMENT

- 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. Pressures from outside the mediation process should never influence the mediator to coerce the parties to settle.

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

COMMENT

- Mediators should have available for the parties information regarding their relevant training, education and experience.
- The requirements for appearing on a 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.

(e) **Confidentiality:** A Mediator Shall Maintain the Reasonable Expectations of the Parties with Regard to Confidentiality.

The reasonable expectations of the parties with regard to confidentiality shall be met by the mediator. The parties' expectations of confidentiality depend on the circumstances of the mediation and any agreements they may make. A 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.

COMMENT

- The parties may make their own rules with respect to confidentiality, or the 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 shall 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.
- Confidentiality should not be construed to limit or prohibit effective monitoring, research, or evaluation of mediation programs by responsible persons. Under appropriate circumstances, researchers may be permitted access to statistical data and, with the permission of the parties, to individual case files, observations and interviews.

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

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

COMMENT

- A mediator may agree to mediate only when he or she is prepared to commit the attention essential to an effective mediation.
- Mediators should only accept cases when they can satisfy the reasonable expectations of the parties concerning the timing of the process.
- A mediator should not allow a mediation to be unduly delayed by parties or their representatives.
- Where appropriate, a mediator should recommend parties seek outside professional advice, or consider resolving their dispute through arbitration, counselling, 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 professions.
- A mediator shall withdraw from a 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.

(g) **Advertising and Solicitation:** A Mediator Shall be Truthful in Advertising and Refrain from Promises and Guarantees of Results.

(h) **Fees:** A Mediator Shall Fully Disclose and Explain the Basis of Compensation, Fees, and Charges to the Parties.

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, mediation service, type and complexity of the matter, expertise of the mediator, time required, and rates customary in the community. The better practice in reaching an understanding about fees is to set down arrangements in a written agreement.

COMMENT

- A mediator who withdraws from a mediation should return any unearned fees 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.

(I) **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.

RULE 904

CONTINUING EDUCATION FOR MEDIATORS

- (a) Each mediator within the State of Kansas seeking approval from the director of dispute resolution, shall earn a minimum of six (6) credit hours of approved mediation education each calendar year.
- (b) The initial training year will begin July 1, 1996 and end on December 31, 1997. Subsequent training years will begin on January 1 and end on December 31.
- (c) The director of dispute resolution shall approve all programs for continuing mediator education credit and shall designate the number of credit hours which can be earned by actual program attendance.
- (d) Each mediator required by this rule to earn continuing mediator education credits shall submit an annual report to the director of dispute resolution of continuing education credits earned by the mediator in such form as prescribed by the director of dispute resolution.
- (e) The director of dispute resolution may grant waivers or extensions of time to complete continuing mediator education requirements because of hardship, disability or other good cause.