

PRACTICE HINTS: ETHICAL AND PROFESSIONAL ISSUES IN MEDIATION

Mediators are not, as a general rule, at risk. This is especially so if mediators stay well within the bounds of being managers of the process and do not range into being experts on the solution or giving advice.

That being said, there are "risk" areas that deserve special mention:

1. Breach of confidentiality: violating the privacy of parties or giving unauthorized disclosure to lawyers or others with regard to the mediation process.
2. Failure to disclose relevant and significant information that the mediator may discover in caucus that could affect the parties determinations.
3. The unauthorized practice of law.
4. The unauthorized practice of counseling.
5. Conflicts of interest: serving as a mediator for a former client (or client of a partner or associate) with or without disclosure. Representing or counseling a client who was previously in mediation.
6. Judgment issues: failing to apprehend significant power imbalances; the misuse of caucus, failing to control for mediator bias.

At the present time, no state licenses or regulates mediators, although some states have begun to establish guidelines or qualifications for mediators to whom courts refer.

The discussions of the competency to mediate and standards of practice are ongoing in the primary professional dispute resolution organizations such as the Academy of Family Mediators (AFM) and the Society of Professionals in Dispute Resolution (SPIDR), as well as other professional organizations concerned with mediation, such as the Association of Family and Conciliation Courts (AFCC) and the American Bar Association (ABA). The Standards of AFM, SPIDR and ABA are in this section.

Malpractice Insurance is available through membership in AFM, AFCC and SPIDR. Many legal and mental health malpractice insurance providers will cover mediation (some at no additional cost), but it is important to obtain a specific written letter or rider from the insurer to verify that they understand mediation practice as separate from legal or counseling practice.

Third Party Payment is generally not available to cover mediation. It is ill-advised to seek coverage of mediation under the coverture of therapy.