

**Academy of Court Appointed Masters  
Annual Meeting April 12-14, 2018  
Panel Discussion on  
Special Master Ethics, Immunity, and Insurance Issue**

Panelists

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Moderator

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**I. Ethics**

See, “Ethical Issues and Practical Concerns,” Section 3 of ACAM’s “Handbook for Judges and Lawyers” (available at [www.courtappointedmasters.org](http://www.courtappointedmasters.org)), which includes a comprehensive list of “Sources of Ethical Rules for Judicial Adjuncts” at Sec. 3.1; “Basic Ethical Rules for Judicial Adjuncts” at Sec. 3.2; and a useful Checklist of “Ethical Rules to Consider for Specific Circumstances” at Section 3.3.

See also, excerpts from “Model Standards of Conduct for Mediators” adopted by each of American Arbitration Association, American Bar Association and Association for Conflict Resolution in 2005, attached at rear of Handout.

See also, an excerpt from “Model Rule for the Lawyer as Third-Party Neutral,” drafted by CPR-Georgetown Commission on Ethics and Standards in ADR (November 2002), attached at rear of Handout.

**A. Potential Conflicts of Interest for Possible Disclosure to Parties** (see attached “Model Standards of Conduct for Mediators” at Sec. III-A through F)

- You or your firm’s current or prior litigation on behalf of, or against, a party or party affiliate
- Your family, social or business relationship with, or financial interest in, a party

- Your family or social relationship, or former affiliation, with a party's lawyer
- Your "repeat player" as a neutral for a party or its law firm
- Other facts that might cause a party to question your ability to be impartial

Sample Disclosure Agreement: JAMS' Denver Agreement to Mediate

(essentially identical language is used in its Special Master Agreement) provides: "**Disclosure:** The mediator practices in association with JAMS. Occasionally, JAMS may enter into arrangements with corporations (including insurance companies), government entities and other organizations to make available dispute resolution professionals in a particular field, for a specific type of matter or training, or for a particular period of time. In addition, your mediator or other professionals at JAMS may have served as neutrals in other matters involving one or more of the parties hereto."

**B. *Ex Parte* Communications with Judge and with Parties**

- "The appointing order must state . . . the circumstances, if any, in which the master may communicate *ex parte* with the court or a party;" FRCP 53(b)(2)(B).
- The scope of master's duties under the order determines when such communications might be appropriate:
  - With the court (*e.g.*, assisting court with legal analysis or understanding highly specialized matters, assisting with procedural or other case management matters)
  - With the parties (*e.g.*, scheduling, discovery and other case management matters)

Sample Appointment Order 1 (from Sample No. 1 of ACAM Benchbook, where special master will serve as a mediator:

- "The parties may have *ex parte* communications with the Special Master as to all matters related in any way to the mediation process. The Special Master may communicate *ex parte* with the Court as he and the Court deem necessary concerning the status of the mediation process, but shall not disclose to the Court the specifics of any party's settlement position without the consent of that party."

Sample 2: (excerpt from Sample 5 in ACAM Benchbook, where special master will serve various roles in multi-district litigation:

- “The Special Master may communicate *ex parte* with the Court at the Special Master’s discretion, without providing notice to the parties, in order to assist the Court with legal analysis . . . The Special Master may also communicate *ex parte* with the Court, without providing notice to the parties, regarding logistics, the nature of his activities, management of the litigation, and other appropriate procedural matters. . . . The Special Master may communicate *ex parte* with any party or his attorney, as the Special Master deems appropriate, for the purposes of ensuring the efficient administration and management of this MDL, including the making of informal suggestions to the parties to facilitate compliance with the Orders of the Court; such *ex parte* communications may, for example, address discovery or other procedural issues. Such *ex parte* communications shall not, however, address the merits of any substantive issue, except that, if the parties seek assistance from the Special Master in resolving a dispute regarding a substantive issue, the Special Master may engage in *ex parte* communications with a party or his attorney regarding the merits of the particular dispute, for the purpose of mediating or negotiating a resolution of that dispute, only with the prior permission of those opposing counsel who are pertinent to the particular dispute.”

Sample 3: Appointment to prepare Report and Recommendation regarding interpretation of patent claims:

- “[Special Master] may not communicate *ex parte* with the individual parties. Any documents exchanged between [Special Master] and the Court shall also be timely served on the parties.
- [Special Master] may communicate with the Court *ex parte* on procedural matters.”

Sample 4: Appointment as technical advisor to the judge on technical or specialized subjects in a patent infringement case:

- “The technical advisor’s communications with the Court shall be *ex parte* and the technical advisor shall have no communication with the parties, or with any of the parties’ experts or any witnesses in the case.

The technical advisor shall communicate only with the Judge and the Judge's law clerk about the case and such communications shall be deemed confidential."

Sample 5: Appointment as "expert advisor to assist the Court in research, analysis and drafting of orders and opinions" in pharmaceutical patent suit:

- "The Court may consult with the advisor from time to time, including pretrial and trial, *ex parte*, regarding both factual and legal issues."

See further materials in Sec. 2 and 3 of ACAM Benchbook.

**C. Unrepresented or Inadequately Represented Parties in Mediation** (see attached Model Standards at Sec. I-A-1,2; II-B; and VI-A), and attached "Model Rule for the Lawyer as Third-Party Neutral" Rule 4.5.6 and Comment 7.

- "A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client." Rule 2.4(b), Lawyer Serving as Third Party Neutral, ABA Model Rule of Professional Conduct
- JAMS Mediators Ethics Guidelines: Para. VI provides: "A mediator should not offer legal advice to a party . . . . A mediator should be particularly sensitive to role differences if any party is unrepresented by counsel at the mediation, and should explain carefully the limitations of the mediator's role and obtain a written waiver of representation from each unrepresented party." Para. VII provides: A mediator should withdraw from the process if the mediation is being used to further illegal conduct, or for any reason set forth above: lack of informed consent, a conflict of interest that has not or cannot be waived, a mediator's inability to remain impartial, or a mediator's physical or mental disability. In addition, a mediator should be aware of the potential need to withdraw from the case if procedural or substantive unfairness appears to have undermined the integrity of the mediation process.
- JAMS Denver Agreement to Mediate (essentially identical language is used in its Special Master Agreement) provides: "The Mediator's Role:

The parties understand that the role of the mediator is not to render a decision but to assist the parties in reaching a mutually acceptable resolution. The parties agree that the mediator is not acting as an attorney or providing legal advice on behalf of any party. The parties understand that the mediator is not obliged to identify or resolve legal issues, whether these issues are raised by the parties in the course of the mediation or not. The parties understand that they may be waiving or compromising legal rights by the settlement of the dispute and their claims. The parties agree to obtain appropriate legal and other professional advice on any issue of interest to them and not to rely on the mediator for any such advice.”

Hypothetical for discussion: Elderly lady, junior high school-graduate, was sued for trespass by new owner of neighboring house in old, run-down neighborhood. She bought her little house 37 years ago, and operates a one-chair barber shop that is her sole support. She cannot afford a lawyer. Her house is alleged to be six inches over the neighbor’s property line.

The neighbor, also non-high school-graduate, wants all the property he thought he just bought. He earns his living mowing and raking yards. His lawyer is chronically under-employed by virtue of general incompetence and alcoholism.

The woman wants to do right, and is willing to cut the wall off the house and rebuild it on her property, but can’t afford that.

You are the mediator. None of these folks seem to know anything about prescriptive rights/adverse possession/statute of limitations. You aren’t a real estate lawyer, but it just doesn’t seem right that she should have to give up the six inches.

What do you do?

What should a mediator do, if anything, if a party appears not to be negotiating in good faith?

## II. Immunity of the Neutral

Appointment as Special Master under Rule 53 of Federal Rules of Civil Procedure:

The doctrine of absolute quasi-judicial immunity shall apply to the actions of the Special Master, when acting in the capacity as Special Master. *In Re: Fema Trailer Formaldehyde Product Liability Litigation*, 2011 WL 5038849, USDC, E.D. Louisiana, No. MDL 07-1873 (unpublished).

Appointment as Claims Administrator:

Quasi-judicial immunity, a derivative of judicial immunity, protects individuals other than judges when their actions or functions are “functionally comparable” to those of judges. *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 435-46, 113 S. Ct. 2167, 2171 (1993). Quasi-judicial immunity has been extended to individuals who perform duties “closely associated with the judicial process” and who “perform tasks that are inextricably intertwined with the judicial function.” *Young v. Selsky*, 41 F.3d 47, 51 (2d Cir. 1994) (quoting *Cleavinger v. Saxner*, 474 U.S. 193, 200, 106 S. Ct. 496, 500 (1985)); *Nystedt v. Nigro*, 700 F.3d 25, 30 (1st Cir. 2012).

In extending immunity to individuals other than judges:

[C]ourts have focused on whether the person derived his powers and responsibilities from judicial appointment; the nature of the appointed duties (whether the court relies on the officer to assist it in its judicial responsibilities); and whether the official’s actions were within the scope of his quasi-judicial duties.

*Quitoriano v. Raff & Becker, LLP*, 675 F. Supp. 2d 444, 450 (S.D.N.Y., 2009) (citing *Anderson v. Conboy*, 1997 WL 177890, at \*6-7 (S.D.N.Y., Apr. 24, 1977); *Dilacio v. N.Y. City Dist. Council of the United Bhd. Of Carpenters*, 593 F. Supp. 2d 571, 578-79 (S.D.N.Y. 2008)). In particular, absolute quasi-judicial immunity has been extended to individuals appointed to various

positions who serve judicial functions, including bankruptcy trustees,<sup>1</sup> court-appointed guardians *ad litem*,<sup>2</sup> court-appointed commissioners,<sup>3</sup> court-appointed receivers,<sup>4</sup> and court-appointed conservators of estates.<sup>5</sup>

Sample: JAMS' Denver Agreement to Mediate: **“Mediator Immunity and Disqualification:** All participants, including counsel for the parties, individually and through their clients, agree that the mediator and JAMS and its employees or agents (“mediator”) are immune and precluded from liability. The participants also agree that the mediator is not a necessary party to any future action and is disqualified as a witness; nor shall the mediator be called as a witness or as an expert regarding any proceeding involving any of the participants and in any manner relating to the dispute which is the subject of this mediation. The participant calling or naming the mediator agrees to pay all JAMS legal fees and costs, including costs of collection, as well as the Mediator’s time incurred as a result. The parties agree to defend the mediator from any subpoenas from outside parties arising out of this agreement. The mediator shall not be called to testify to any mediation communications as defined by Colorado statutes.”

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<sup>1</sup> *Mullis v. Bankr. Court for Dist. Of Nevada*, 828 F.2d 1385, 1387 (9th Cir. 1987).

<sup>2</sup> *Ward v. San Diego County Dep't. of Soc. Servs.*, 691 F. Supp. 238, 241 (S.D. Cal. 1988).

<sup>3</sup> *Ashbrook v. Hoffman*, 617 F.2d 474, 476-77 (7th Cir. 1980).

<sup>4</sup> *Kermit Constr. Corp. v. Banco Credito y Ahorro Ponceno*, 547 F.2d 1, 2-3 (1st Cir. 1976).

<sup>5</sup> *Mosher v. Saalfeld*, 589 F.2d 438, 442 (9th Cir. 1978).

### III. Insurance

Examples of professional liability insurance coverage for neutrals:

1. Both Rick Grauer's policy as an individual and Ken Simon's policy as a member of the Judicial Arbiter Group, Inc. are entitled: Arbitrators, Hearing Officers and Mediators Professional Liability Insurance, issued by Underwriters at Lloyd's, London; Complete Equity Markets, Inc., 1190 Flex Court, Lake Zurich, Illinois 60047-1578. (800) 323-6234.

Definitions:

"Professional Services' shall include Arbitration Proceedings, Dispute Resolution Services, Hearing Officer Services, mediating Domestic Relation Disputes, Consultant Services, Custody Evaluation, Early Neutral Evaluation Services, Expert Witness Services, Facilitation Services, Fact Finding Services, Guardian ad Litem, Guardian of the Person, Judge Pro Tempore, Parent Coordination, Special Masters, and Training Services." [each of the capitalized terms is further defined in the policy]

2. John Leopold's JAMS Denver policy with Complete Equity Markets, Inc. provides coverage "For damages resulting from negligent acts, errors or omissions in the conduct of professional services in Arbitration Proceedings, Dispute Resolution Services, Domestic Relations Disputes and/or Parenting Coordination."

*[Excerpted for ACAM Handout. Full text available at  
ABA's Dispute Resolution Section Website]*

**MODEL STANDARDS OF CONDUCT  
FOR MEDIATORS  
AMERICAN ARBITRATION ASSOCIATION  
(ADOPTED SEPTEMBER 8, 2005)  
AMERICAN BAR ASSOCIATION  
(APPROVED BY THE ABA HOUSE OF DELEGATES AUGUST 9, 2005)  
ASSOCIATION FOR CONFLICT RESOLUTION  
(ADOPTED AUGUST 22, 2005)  
SEPTEMBER 2005**

The Model Standards of Conduct for Mediators was prepared in 1994 by the American Arbitration Association, the American Bar Association's Section of Dispute Resolution, and the Association for Conflict Resolution<sup>1</sup>. A joint committee consisting of representatives from the same successor organizations revised the Model Standards in 2005.<sup>2</sup> Both the original 1994 version and the 2005 revision have been approved by each participating organization.<sup>3</sup>

**Preamble**

Mediation is used to resolve a broad range of conflicts within a variety of settings. These Standards are designed to serve as fundamental ethical guidelines for persons mediating in all practice contexts. They serve three primary goals: to guide the conduct of mediators; to inform the mediating parties; and to promote public confidence in mediation as a process for resolving disputes.

Mediation is a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision making by the parties to the dispute.

Mediation serves various purposes, including providing the opportunity for parties to define and clarify issues, understand different perspectives, identify interests, explore and assess possible solutions, and reach mutually satisfactory agreements, when desired.

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<sup>1</sup> The Association for Conflict Resolution is a merged organization of the Academy of Family Mediators, the Conflict Resolution Education Network and the Society of Professionals in Dispute Resolution (SPIDR). SPIDR was the third participating organization in the development of the 1994 Standards.

<sup>2</sup> Reporter's Notes, which are not part of these Standards and therefore have not been specifically approved by any of the organizations, provide commentary regarding these revisions.

<sup>3</sup> The 2005 version to the Model Standards were approved by the American Bar Association's House of Delegates on August 9, 2005, the Board of the Association of Conflict Resolution on August 22, 2005 and the Executive Committee of the American Arbitration Association on September 8, 2005.

### **Note on Construction**

These Standards are to be read and construed in their entirety. There is no priority significance attached to the sequence in which the Standards appear.

The use of the term “shall” in a Standard indicates that the mediator must follow the practice described. The use of the term “should” indicates that the practice described in the standard is highly desirable, but not required, and is to be departed from only for very strong reasons and requires careful use of judgment and discretion.

The use of the term “mediator” is understood to be inclusive so that it applies to co-mediator models.

These Standards do not include specific temporal parameters when referencing a mediation, and therefore, do not define the exact beginning or ending of a mediation.

Various aspects of a mediation, including some matters covered by these Standards, may also be affected by applicable law, court rules, regulations, other applicable professional rules, mediation rules to which the parties have agreed and other agreements of the parties. These sources may create conflicts with, and may take precedence over, these Standards. However, a mediator should make every effort to comply with the spirit and intent of these Standards in resolving such conflicts. This effort should include honoring all remaining Standards not in conflict with these other sources.

These Standards, unless and until adopted by a court or other regulatory authority do not have the force of law. Nonetheless, the fact that these Standards have been adopted by the respective sponsoring entities, should alert mediators to the fact that the Standards might be viewed as establishing a standard of care for mediators.

### **STANDARD I. SELF-DETERMINATION**

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, uncoerced decision in which each party makes free and informed choices as to process and outcome. Parties may exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes.

1. Although party self-determination for process design is a fundamental principle of mediation practice, a mediator may need to balance such party self-determination with a mediator’s duty to conduct a quality process in accordance with these Standards.

2. A mediator cannot personally ensure that each party has made free and informed choices to reach particular decisions, but, where appropriate, a mediator should make the parties aware of the importance of consulting other professionals to help them make informed choices.

B. 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.

### **STANDARD II. IMPARTIALITY**

A. A mediator shall decline a mediation if the mediator cannot conduct it in an impartial manner. Impartiality means freedom from favoritism, bias or prejudice.

B. A mediator shall conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality.

1. A mediator should not act with partiality or prejudice based on any participant's personal characteristics, background, values and beliefs, or performance at a mediation, or any other reason.
  2. A mediator should neither give nor accept a gift, favor, loan or other item of value that raises a question as to the mediator's actual or perceived impartiality.
  3. A mediator may accept or give de minimis gifts or incidental items or services that are provided to facilitate a mediation or respect cultural norms so long as such practices do not raise questions as to a mediator's actual or perceived impartiality.
- C. If at any time a mediator is unable to conduct a mediation in an impartial manner, the mediator shall withdraw.

### **STANDARD III. CONFLICTS OF INTEREST**

- A. A mediator shall avoid a conflict of interest or the appearance of a conflict of interest during and after a mediation. A conflict of interest can arise from involvement by a mediator with the subject matter of the dispute or from any relationship between a mediator and any mediation participant, whether past or present, personal or professional, that reasonably raises a question of a mediator's impartiality.
- B. A mediator shall make a reasonable inquiry to determine whether there are any facts that a reasonable individual would consider likely to create a potential or actual conflict of interest for a mediator. A mediator's actions necessary to accomplish a reasonable inquiry into potential conflicts of interest may vary based on practice context.
- C. A mediator shall disclose, as soon as practicable, all actual and potential conflicts of interest that are reasonably known to the mediator and could reasonably be seen as raising a question about the mediator's impartiality. After disclosure, if all parties agree, the mediator may proceed with the mediation.
- D. If a mediator learns any fact after accepting a mediation that raises a question with respect to that mediator's service creating a potential or actual conflict of interest, the mediator shall disclose it as quickly as practicable. After disclosure, if all parties agree, the mediator may proceed with the mediation.
- E. If a mediator's conflict of interest might reasonably be viewed as undermining the integrity of the mediation, a mediator shall withdraw from or decline to proceed with the mediation regardless of the expressed desire or agreement of the parties to the contrary.
- F. Subsequent to a mediation, a mediator shall not establish another relationship with any of the participants in any matter that would raise questions about the integrity of the mediation. When a mediator develops personal or professional relationships with parties, other individuals or organizations following a mediation in which they were involved, the mediator should consider factors such as time elapsed following the mediation, the nature of the relationships established, and services offered when determining whether the relationships might create a perceived or actual conflict of interest.

### **STANDARD IV. COMPETENCE *[deleted for ACAM Handout]***

### **STANDARD V. CONFIDENTIALITY *[deleted for ACAM Handout]***

## **STANDARD VI. QUALITY OF THE PROCESS**

- A. 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.
1. A mediator should agree to mediate only when the mediator is prepared to commit the attention essential to an effective mediation.
  2. A mediator should only accept cases when the mediator can satisfy the reasonable expectation of the parties concerning the timing of a mediation.
  3. 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.
  4. 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.
  5. The role of a mediator differs substantially from other professional roles. Mixing the role of a mediator and the role of another profession is problematic and thus, a mediator should distinguish between the roles. A mediator may provide information that the mediator is qualified by training or experience to provide, only if the mediator can do so consistent with these Standards.
  6. 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.
  7. A mediator may recommend, when appropriate, that parties consider resolving their dispute through arbitration, counseling, neutral evaluation or other processes.
  8. 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.
  9. If a mediation is being used to further criminal conduct, a mediator should take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.
  10. 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.
- B. 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.
- C. 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 VII. ADVERTISING AND SOLICITATION *[deleted for ACAM Handout]***

**STANDARD VIII. FEES AND OTHER CHARGES *[deleted for ACAM Handout]***

**STANDARD IX. ADVANCEMENT OF MEDIATION PRACTICE *[deleted for ACAM Handout]***

*[Excerpt from]*

**“Model Rule for the Lawyer as Third-Party Neutral”**

drafted by CPR-Georgetown Commission on Ethics and Standards in ADR (November 2002) and offered as “a framework or architecture for consideration by the appropriate bodies of the American Bar Association and any state agency or legislature charged with drafting lawyer ethics rules”

*[Note: The ACAM panel has highlighted references to “fairness” in the following proposed model rule. Significantly, both the CPR-Georgetown proposed model rules (below) and the subsequently adopted 2005 Model Standard of Conduct for Mediators (see line 3 of Standard VI-A as excerpted above) promote “fairness” only with regard to the mediation process, and not with regard to the result.*

Rule 4.5.6: Fairness and Integrity of the Process

(a) The lawyer serving as third-party neutral shall make reasonable efforts to determine that the ADR proceedings utilized are explained to the parties and their counsel, and that the parties knowingly consent to the process being used and the neutral selected (unless applicable law, court rules or contract requires use of a particular process or third-party neutral).

(b) The lawyer-neutral shall not engage in any process or procedure not consented to by the parties (unless required by applicable law, court rules or contract).

(c) The lawyer-neutral shall use reasonable efforts to conduct the process with fairness to all parties. The lawyer-neutral shall be especially diligent that parties who are not represented have adequate opportunities to be heard and involved in any ADR proceedings.

(d) The lawyer-neutral shall make reasonable efforts to prevent misconduct that would invalidate any settlement. The neutral shall also make reasonable efforts to determine that the parties have reached agreement of their own volition and knowingly consent to any settlement.

COMMENT

[1] While ethical rules cannot guarantee the specific procedures or fairness of a process, this Model Rule is intended to require lawyer-neutrals to be attentive to the basic values and goals informing fair dispute resolution. These values include party autonomy; party choice of process (to the extent permitted by law or contract); party choice of and consent to the choice of the third-party neutral (to the extent permitted by law or contract); and fairness of the conduct of the process itself. This Model Rule is concerned not only with specific harms to particular participating parties but also with the appearance of the integrity of the process to the public and other possible users of these processes.<sup>57</sup>

[2] This section requires lawyer-neutrals to make reasonable efforts to determine that the parties have reached an agreement of their own volition; one that is not coerced. While some have

suggested that third-party neutrals should bear some moral accountability or legal responsibility for the agreements they help facilitate,<sup>58</sup>this Model Rule does not make the neutral the guarantor of a fair or just result.<sup>59</sup>

[3] This section of the Model Rule is designed to prevent harm not only to parties engaged in dispute resolution processes, but to the appearances presented to the general public of how legal processes are conducted. Although this section of the Model Rule may suffer from the same complaints about vagueness as the **former Canon 9 “appearance of impropriety” did under the old structure of the Code of Professional Conduct**, the drafters believe that where lawyers “switch” sides and roles, from partisan to neutral, it is important to provide for basic criteria of fairness to be monitored in the process for the acceptability and legitimacy of the process and the lawyers within it.