

THE SOUTH AFRICAN ASSOCIATION OF MEDIATORS

CODE OF ETHICS AND PROFESSIONAL RESPONSIBILITY FOR ACCREDITED FAMILY AND DIVORCE MEDIATORS

DEFINITION

Mediation is a family – centered conflict resolution process in which an impartial third party assists the participants to negotiate a consensual and informed settlement. In mediation, whether private or public, decision-making authority rests with the participants. The role of the mediator includes reducing the obstacles to communication, maximising the exploration of alternatives, addressing the needs of those who are involved or effected and uses creative problem solving techniques to enable the participants to reach their own agreement.

1. **PROCEDURE**

1.1. **Description of Mediation**

The mediator shall define mediation and describe the differences and similarities between mediation and other procedures for dispute resolution. In defining the process, the mediator shall delineate it from therapy, counseling, custody evaluation, conciliation, reconciliation, arbitration and litigation.

1.2. **Identification of issues**

The mediator shall elicit sufficient information from the participants so that they can mutually agree on the issues to be resolved in mediation.

1.3. **Training and experience**

The mediator's education and training and experience to enable the mediator to mediate the issues, should be accurately and correctly described to the participants.

1.4. **Mutual duties and responsibilities**

The mediator shall reach an understanding with the participants regarding the procedures to be followed in mediation. This includes but is not limited to the practice as to separate meetings between a participant and the mediator, confidentiality, use of legal services, the involvement of additional parties and conditions under which mediation may be terminated. The mediator and the participants shall agree upon the duties and responsibilities that each is accepting in the mediation process. This may be a written or verbal agreement.

The mediator shall ensure that each participant has had an opportunity to understand the implications and ramifications of available options. In the event that a participant needs either additional information or assistance in order for the negotiations to proceed in a fair and orderly manner or for an agreement to be reached, the mediator shall refer the participant to the appropriate resources.

The mediator shall explore whether the participants are capable of participating in informed negotiations. The mediator may postpone the mediation and refer the participants to the appropriate resources if necessary.

1.5. **Confidentially and Exchange of Information**

1.5.1. Confidentiality: Confidentiality relates to the full and open disclosures necessary for the mediation process. A mediator shall foster the confidentiality of the process.

1.5.2. Limits of Confidentiality: The mediator shall inform the participants at the initial meeting of limitation of confidentiality such as statutory or judicially mandated reporting.

1.5.3. Consequences of Disclosure of Facts between Participants: The mediator shall discuss with the participants the potential consequences of their disclosure of facts to each other during the mediation process.

1.5.4. Caucuses//Side Meetings: The mediator shall discuss policies regarding confidentiality for individual caucuses/side meetings. In the event that a mediator with the consent of the participants, speaks privately with any person not represented in mediation, including children, the mediator shall define how information received will be used.

1.6. **Professional Advice**

1.6.1. Independent Advice and Information: The mediator shall encourage and assist the participants to obtain independent expert information and advice when such information is needed to reach an informed agreement or protect the rights of a participant.

1.6.2. Providing information: A mediator shall give information only in those areas where qualified by training or experience.

1.6.3. Independent legal advice: When the mediation may affect legal rights or obligations, the mediator shall advise the participants to seek independent legal advice prior to resolving the issues and in conjunction with formalising an agreement.

1.7. **Appropriateness of mediation**

The mediator shall help the participants evaluate the benefits, risks and costs of mediation and the alternatives available to them.

1.8. **Self Determination**

1.8.1. Mediation is based on the principal of self-determination by the parties. Self-determination requires that the Mediator rely on the parties to reach a voluntary agreement.

1.8.2. The Mediator may provide information about the process, raise issues and help explore options. The primary role of the Mediator is to facilitate a voluntary resolution of the dispute.

1.8.3. The Mediator may not coerce a party into an agreement and shall not make decisions for any party in the mediation process.

1.8.4. The Mediator shall promote a balanced process and shall encourage the parties to conduct the mediation in a collaborative and non-adversarial manner.

1.8.5. Where appropriate, the Mediator shall promote consideration of the interests of persons affected by actual or potential agreements who are not present or represented at the mediation.

1.9. **Concluding mediation**

1.9.1. With agreement (includes “Memorandum of Understanding”):

A. Full Agreement: The mediator shall discuss with the participants the process for formalisation and implementation of the agreement.

The Mediator has no vested interest in the outcome of the mediation. Therefore, the Mediator must encourage the parties to develop their own solution to the conflict. The Mediator may suggest options for the parties to consider only if the suggestions do not affect the parties' self-determination or the Mediator's impartiality. The Mediator may not recommend particular solutions to any of the issues in dispute between the parties nor coerce the parties to reach an agreement on any or all of the issues being mediated.

Prior to the parties entering into a mediated agreement, the Mediator has the obligation to determine that:-

- i) The parties have considered all that the agreement involves and the possible ramifications of the agreement;

- ii) The parties have also considered the interests of other persons who are not parties to the mediation but are affected by the agreement; and

- iii) The parties have entered into the agreement voluntarily.

The Mediator shall encourage review of any agreement by an independent legal adviser for each of the parties prior to the mediated agreement being signed by the parties

If a Mediator has concerns about the possible consequences of a proposed agreement or that any party does not fully understand the terms of the agreement or its ramifications, the Mediator has the obligation to raise these concerns with the parties.

Under circumstances in which the Mediator believes that manifest injustice would result if the agreement were signed as drafted, the Mediator shall withdraw from the mediation prior to the agreement being signed.

- B. Partial Agreement: When the participants reach a partial agreement, the mediator shall discuss with them the procedures available to resolve the remaining issues.

1.9.2. Without agreement

- A. Termination by participants: The mediator shall inform the participants of their right to withdraw from mediation at any time and for any reason.

- B. Termination by mediator: If a mediator believes that the participants are unable or unwilling to participate meaningfully in the process or that a reasonable agreement is unlikely, the mediator must suspend all or terminate mediation and should encourage the participants to seek appropriate professional help.

- C. Impasse: If the participants reach a final impasse, the mediator should not prolong unproductive discussions that would result in emotional and monetary costs to the participants.

1.10. **QUALITY OF PROCESS**

- 1.10.1. A Mediator shall conduct the mediation diligently and shall not prolong the mediation for the purpose of increasing charges.

1.10.2. If, in a Mediator's judgment, the integrity of the process has been compromised by, for example, inability or unwillingness of a party to participate meaningfully, gross inequality of bargaining power, gross unfairness resulting from non-disclosure or fraud by a participant, the Mediator shall inform the parties. The Mediator shall discontinue the mediation in such circumstances but shall not violate the obligation of confidentiality.

1.11. **ABSOLUTE BAR TO MEDIATING**

A Mediator may not mediate in any of the following circumstances even if the parties specifically request him/her to do so and purport to give consent:

1.11.1. Where the Mediator or a member of his/her partnership/consortium or family has a personal or financial interest in the outcome of the mediation.

- 1.11.2. Where the Mediator or a member of his/her partnership/consortium has at any time provided legal advice or any other professional advice, support or representation for any one party individually before the mediation in relation to any issue that may arise in the mediation.
- 1.11.3. Where the Mediator has at any time had a therapist/client or counsel/client relationship or attorney/client relationship with one only of the parties;
- 1.11.4. Where the Mediator advises, acts for or counsels or has previously advised or acted for any third party whose interests may conflict with those of either or both parties to mediation. (Example – Trustees of a Family Trust of which either party is a beneficiary, discretionary or otherwise).
- 1.11.5. Where a Mediator advises, acts for or counsels or has previously advised, acted for or counseled any third party on a matter related to the likely issues in the mediation.

1.11.6. Where the Mediator is aware that for personal or other reasons, he/she will not be able to mediate in an impartial way or, notwithstanding informed consent, is likely to be perceived as being unable to do so.

2. **STANDARDS OF CONDUCT**

A Mediator shall conduct mediation in an impartial and ethical manner by providing a balanced process in which each participant is given an opportunity to participate. A Mediator may encourage the participants to identify their interests and evaluate options for resolution in a collaborative non-adversarial manner.

2.1. **Training and education:**

2.1.1. **Training:** A mediator shall acquire substantive knowledge and procedural skill in the specialised area of practice. This may include but is not limited to Family and Human Development, Family Law, Divorce Procedures, Family Finances, Community Resources, The Mediation Process and Professional Ethics.

2.1.2. **Continuing education:** A mediator shall participate in continuing education and be personally responsible for ongoing professional growth. A mediator is encouraged to join with other mediators and members of related professions to promote mutual professional development.

2.2. **Advertising**

A mediator shall make only accurate statements about the mediation process, its costs and benefits and the mediator's qualifications.

2.3. **Level of Skill or Expertise**

2.3.1. The Mediator has the obligation to refuse a referral if he or she believes that the referral would require skill that would exceed his/her current level of expertise.

2.3.2. If a Mediator determines during the course of a mediation that a lack of technical knowledge or skill impairs or is likely to impair the Mediator's effectiveness, the Mediator shall notify the parties and may withdraw of his own accord or if requested by any party.

3. **CODE OF ETHICS**

3.1. **Impartiality and Neutrality**

- A. Impartiality: The mediator is obligated to maintain impartiality towards all participants. Impartiality is seen in terms of absence of favouritism, bias and adopting a non-adversarial role. The mediator has a responsibility to maintain impartiality. Impartiality means freedom from bias in word, action and appearance. Impartiality implies a commitment to aid all parties in moving towards an agreement. A Mediator shall avoid conduct which gives the appearance of partiality towards one of the parties. A Mediator should guard against partiality or prejudice based on the parties personal characteristics, background or performance at the mediation.
- B. Neutrality: Refers to the relationship that the mediator has with the disputing parties. If the mediator feels, or anyone of the participants state, that the mediator's background or personal experiences would prejudice the mediator's performance, the mediator should withdraw from mediation unless all agree to proceed.

3.2. **PRIOR RELATIONSHIPS:**

A mediator's actual or perceived impartiality may be compromised by social or professional relationships with one of the participants at any point in time. The mediator shall not proceed if previous legal or counseling services have been provided by the same mediator to one of the participants. If such services have been provided to both participants, mediation shall not proceed unless the prior relationship has been discussed, the role of the mediator made distinct from the earlier relationship and the participants given the opportunity to freely choose to proceed.

3.3. **Relationship to Participants**

The mediator should be aware that post-mediation professional or social relationships may compromise the mediator's continued availability as a neutral third party.

3.4. **Conflicts of Interest**

A mediator should disclose any circumstances to the participants that may cause a conflict of interests.

3.5. **Referrals and Commissions**

No commissions, rebates or similar forms of remuneration shall be given or received for referral of clients for mediation services.

3.6. **Confidentiality**

Confidentiality in Mediation is important to encourage all participants to speak truthfully and candidly, to enable a full exploration of issues in dispute and to reach a complete and satisfactory resolution.

3.6.1. **Release of Information:** The mediator shall obtain a consent of the participants prior to releasing information to others. The mediator shall maintain confidentiality and render anonymous all identifying information when materials are used for research or training purposes.

3.6.2. **Preservation of confidentiality:** A mediator shall preserve and maintain the confidentiality of mediation proceedings except where required by Law to disclose information. If a mediator or the Law has established specific exceptions to the general law of confidentiality, these exceptions must be disclosed to the participants prior to reaching an agreement to mediate. Where case information is published or made public without the permission of all parties, a Mediator shall render anonymous all identifying information.

3.6.3. **Confidentiality within the mediation process:** If a Mediator speaks privately with any participant(s) during mediation, the Mediator shall first discuss with all participants his/her/their policy regarding confidentiality for individual communications with the participants. A Mediator shall not disclose information to the other participants when confidentiality has been requested.

4. **MARKETING AND COMPENSATION**

- 4.1. A Mediator shall be truthful and accurate in marketing mediation services and shall not promise or guarantee results.

- 4.2. A Mediator is entitled to reasonable compensation for his or her services. Prior to mediation, the Mediator must disclose all applicable fees, charges and costs. A Mediator shall not charge a fee contingent upon the outcome of the mediation. A Mediator is encouraged to consider providing pro-amico or reduced fee services in instances where the participants do not have the means to pay for mediation services.

- 4.3. Except for fees directly related to mediation services provided, a Mediator must not solicit, accept or exchange any fee, gift or favour of significant value with any participant or their affiliate in any pending, scheduled or concluded mediation for a reasonable time. A Mediator must use judgment that reflects the high ethical fields that are required.

5. **RELATIONSHIP WITH OTHER MEDIATORS AND PROFESSIONALS**

5.1. **Relationships with other mediators:** A Mediator should not mediate any dispute that is being mediated by another mediator without first endeavouring to consult with the person or persons conducting such mediation.

5.2. **Co-mediation:** In those situations where more than one mediator is participating in a particular case, each mediator has a responsibility to keep the other informed of developments essential to a cooperative effort.

- 5.3. **Relationships with other professionals:** A Mediator should respect the complementary relationship between mediation, legal, mental health and other social services and should promote cooperation with other professionals.
- 5.4. **Ethical violations by other Mediators:** When a Mediator/s knows of an ethical violation by another mediator and it seems appropriate, he/they should informally attempt to resolve the issue by bringing the behaviour to the attention of that Mediator. If the conduct is of a minor nature and/or appears to be due to lack of sensitivity, knowledge or experience, such an informal solution is usually appropriate. If the violation does not seem amenable to an informal solution and is of a more serious nature, the Mediator should bring it to the attention of THE SOUTH AFRICAN ASSOCIATION OF MEDIATORS in writing.
6. **ADVANCEMENT OF MEDIATION**
- 6.1. **Mediation services:** A Mediator is encouraged to provide some mediation service in the community for nominal or no fee.

- 6.2. **Promotion of mediation:** A mediator shall promote the advancement of mediation by encouraging and participating in research, publishing or other forms of professional and public education.

7. **BREACH**

Any breach of any Clause which is contained in this entire document may result in the suspension or termination of membership in THE SOUTH AFRICAN ASSOCIATION OF MEDIATORS.

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