



South African Association of Mediators

Code of Ethics and Professional Responsibility
for Accredited Mediators

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Contents

| | | |
|-------|---|----|
| 1. | DEFINITION | 1 |
| 2. | PRINCIPLES OF MEDIATION ETHICS | 1 |
| 2.1 | Impartiality and neutrality: | 1 |
| 2.2 | Conflicts of interest: | 2 |
| 2.3 | Competence and/or professional role boundaries: | 2 |
| 2.4 | Voluntariness: | 3 |
| 2.5 | Party autonomy: | 3 |
| 2.6 | Confidentiality: | 4 |
| 2.7 | Informed consent – | 5 |
| 2.8 | Transparency over qualification, experience, fees, and practice: | 5 |
| 2.9 | Referrals and commission: | 6 |
| 2.10. | Advancement of mediation | 6 |
| 3. | PROCEDURE | 7 |
| 3.1 | Description of mediation: | 7 |
| 3.2 | Prior to commencement of the mediation: | 7 |
| 3.3 | Training and experience: | 7 |
| 3.4 | Identification of issues: | 8 |
| 3.5 | Impartiality and neutrality: | 8 |
| 3.6 | Mutual duties and responsibilities: | 8 |
| 3.7 | Confidentiality: | 9 |
| 3.8 | Independent advice and information: | 9 |
| 3.9 | Appropriateness of mediation: | 10 |
| 3.10 | Party autonomy: | 10 |
| 3.11 | Concluding mediation: | 11 |
| 3.12 | Quality of the process: | 12 |
| 3.13 | Bar to mediating: | 13 |
| 4. | SPECIAL POLICY CONSIDERATIONS IN FAMILY LAW MATTERS AND DISPUTES AFFECTING CHILDREN AND OTHER VULNERABLE ADULTS | 13 |
| 4.1 | Policy considerations: | 13 |

4.2 Mediator’s duty towards children and vulnerable adults: 14

4.3 Less strict application of certain principles of mediation ethics: 14

4.4 Mediator to promote consideration of the interests of children and vulnerable adults:..... 14

4.5 Principle of the best interests of the child:..... 14

5. RELATIONSHIP WITH OTHER MEDIATORS AND PROFESSIONALS..... 15

5.1 Relationships with other mediators:..... 15

5.2 Co-mediation: 16

5.3 Relationships with other professionals: 16

5.4 Ethical violations by other mediators: 16

6. BREACH 16

1. DEFINITION

Mediation is a dispute resolution process in which an impartial third party assists the participants to negotiate a consensual and informed settlement in the best interests of the participants. In mediation, whether private or public, the decision-making power 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 affected, and using creative problem-solving techniques to enable the participants to reach their own agreement.

2. PRINCIPLES OF MEDIATION ETHICS

2.1 Impartiality and neutrality:

The mediator is obligated to maintain impartiality and neutrality towards all participants. Impartiality is seen in terms of the absence of favouritism, bias, and adopting a non-adversarial role. Impartiality means freedom from bias in word, action, and appearance. Neutrality refers to the relationship that the mediator has with the disputing participants. Therefore: -

2.1.1 A mediator must guard against partiality or prejudice based on the participants' personalities, background, or performance at the mediation.

2.1.2 A mediator must avoid conduct that gives the appearance of partiality towards one of the participants.

2.1.3 A mediator's actual or perceived impartiality may be compromised by personal or professional relationships with one of the participants at any point in time.

2.2 Conflicts of interest:

The objective aspect of neutrality is that the participants must believe, based upon any disclosures the mediator makes, that the mediator is neutral in the sense that he or she does not have any conflict of interest. Therefore: -

- 2.2.1 Mediators must avoid serving in cases where they have a direct or indirect personal, professional, or financial interest in the outcome of the dispute.
- 2.2.2 A mediator must disclose any circumstances to the participants that may cause a conflict of interests.
- 2.2.3 If a potential conflict of interests is disclosed well in advance and the participants nonetheless accept the mediator, the potential conflict is resolved.
- 2.2.4 However, if the conflict is so severe that even waiver does not cure it, or the appearance of impropriety is so strong that it cannot be resolved by full disclosure, the mediator must decline the case.

2.3 Competence and/or professional role boundaries:

Mediators have a duty to know the limits of their ability; to avoid taking on assignments they are not equipped to handle; and to communicate candidly with the participants about their background and experience. Observing professional role boundaries is the corollary of this duty. Mediators must avoid providing other types of professional service, even if they are licensed to provide them. Mediators may therefore not act in dual sequential roles. Therefore: -

- 2.3.1 The mediator must refuse a referral if he or she believes that the referral would require skill that would exceed his or her current level of expertise.
- 2.3.2 If a mediator determines during mediation that a lack of technical knowledge or skill impairs or is likely to impair the mediator's effectiveness, the mediator must notify the participants and may withdraw of his or her own accord or if requested by any participant.

2.3.3 A mediator must not proceed if previous legal or counselling services have been provided by the same mediator to one of the participants. Where such services have been provided to both participants, mediation should 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.

2.4 Voluntariness:

Even where some participants come to mediation because they are required to do so (e.g., ordered by a court, or compelled to mediate in terms of legislation), they must participate in good faith and make an effort to negotiate a resolution. However, participants cannot be forced to reach an agreement and they must have the right at a certain point to walk away from the negotiation table. Therefore: -

2.4.1 Mediators should remind the participants that any agreement they reach must be a product of their own free will, and that they may withdraw from the process if it is not moving in the direction of an agreement.

2.5 Party autonomy:

Mediation is based on the principle of self-determination by the participants. Supporting and encouraging the participants in a mediation to make their own decisions (both individually and collectively) about the resolution of the dispute, rather than imposing the ideas of the mediator or others, is fundamental to the process. Therefore: -

2.5.1 A mediator must allow and rely on the participants to make their own decisions and to reach a voluntary agreement.

2.5.2 A mediator should prevent one participant from dominating another participant in a manner that prevents him or her from making his or her own decisions.

2.5.3 A mediator must conduct a mediation impartially and ethically by providing a balanced process in which each participant is allowed to participate.

2.6 Confidentiality:

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

2.6.1 In general terms, a mediator must preserve and maintain the confidentiality of mediation proceedings at all times, except where required by law to disclose information or one or more of the participants agree otherwise.

2.6.2 Mediators are required to safeguard the privacy and confidentiality of participants in the mediation process vis-à-vis third parties, namely those outside the mediation.

2.6.3 The mediator must obtain the consent of the participants prior to releasing information to others.

2.6.4 The mediator must maintain confidentiality and render anonymous all identifying information when materials are used for research or training purposes.

2.6.5 If a mediator speaks privately with any participant(s) during mediation, the mediator must first discuss with all participants his or her policy regarding confidentiality for individual communications with the participants.

2.6.6 A mediator may not disclose information to the other participants whenever confidentiality has been requested.

2.7 Informed consent –

disclosure of relevant documentation and information:

A voluntary, self-determined resolution of a dispute will serve the participants' interests only if it is an informed choice. Therefore: -

2.7.1 Although mediators need not be (and usually should not be) the source of the participants' information, they should ensure that the participants are in possession of sufficient facts to assess their options for settlement and their alternatives to settlement.

2.7.2 No negotiation or decision on any issue may take place or be taken until all relevant documentation and information have been obtained and assimilated by all participants.

2.7.3 If the participants lack this information, the mediator should explain to them how they might obtain it.

2.8 Transparency over qualification, experience, fees, and practice:

Mediators need to be transparent about their qualifications and experience and the fees that the participants will be charged for the mediation. Mediators also need to present and promote their practice in a truthful way. Therefore, it is required that: -

2.8.1 A mediator must acquire substantive knowledge and procedural skills 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.

2.8.2 A mediator must participate in continuing education and be personally responsible for ongoing professional growth.

2.8.3 A mediator is encouraged to join with other mediators and members of related professions to promote mutual professional development.

2.8.4 A mediator must be truthful and accurate in marketing mediation services and must not promise or guarantee results.

2.8.5 Only duly accredited mediators may use the title “accredited mediator” and the SAAM and NABFAM logo.

2.8.6 A mediator is entitled to reasonable compensation for his or her services and should not charge exorbitant fees.

2.8.7 A mediator may not charge a fee contingent upon the outcome of the mediation.

2.8.8 A mediator is encouraged to consider providing *pro bono* or reduced fee services in instances where the participants do not have the means to pay for mediation services.

2.8.9 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 his or her affiliate in any pending, scheduled, or concluded mediation.

2.9 Referrals and commission:

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

2.10. Advancement of mediation

2.10.1 A mediator is encouraged to provide some mediation service in the community for a nominal or no fee.

2.10.2 A mediator should promote the advancement of mediation by encouraging and participating in research, publishing, or other forms of professional and public education.

3. PROCEDURE

3.1 Description of mediation:

3.1.1 The mediator must explain to the participants what mediation is and describe the differences and similarities between mediation and other procedures for dispute resolution.

3.1.2 In explaining the process, the mediator must distinguish it from therapy, counselling, care evaluation, coaching, conciliation, reconciliation, arbitration and litigation.

3.2 Prior to commencement of the mediation:

3.2.1 If the mediator feels, or any one of the participants states, that the mediator's background or personal experiences would prejudice the mediator's performance, the mediator must withdraw from the mediation unless all participants agree to proceed.

3.2.2 Prior to mediation, the mediator must disclose all applicable fees, charges, and costs.

3.3 Training and experience:

The mediator should accurately and correctly describe his or her educational qualifications, training and experience to the participants.

3.4 Identification of issues:

The mediator should elicit or generate sufficient information during the mediation from the participants so that the participants can mutually agree on the issues to be resolved in mediation.

3.5 Impartiality and neutrality:

The duty to remain impartial throughout the mediation does not require mediators to withdraw from the case if they become aware of such feelings, but instead to act in such a way that those feelings (whatever they may be) are kept to themselves.

3.6 Mutual duties and responsibilities:

The mediator must reach an understanding with the participants regarding the procedures and processes to be followed in mediation, which includes inter alia the practice of caucuses/side meetings (if required) between a participant and the mediator, confidentiality, voluntary full, open, and honest disclosure of all relevant information, use of legal services, the involvement of additional participants and conditions under which mediation may be terminated. Therefore: -

3.6.1 The mediator and the participants must agree upon the duties and responsibilities that each is accepting in the mediation process. This agreement should preferably be in writing.

3.6.2 The mediator must ensure that each participant has had an opportunity to understand the implications and ramifications of available options.

3.6.3 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 must refer the participant to the appropriate resources.

3.6.4 The mediator may postpone the mediation to allow participants to consult the appropriate resources if necessary.

3.6.5 The mediator must explore whether the participants are capable of participating in informed negotiations.

3.6.6 The mediator should also screen the participants for signs of domestic violence.

3.7 Confidentiality:

3.7.1 Mediators must inform participants at the initial meeting of the limitations of confidentiality, such as, statutory or judicially mandated reporting.

3.7.2 The mediator must discuss with the participants the potential consequences of their disclosure of facts to each other during the mediation process.

3.7.3 The no prejudice rule covers only the participants and not the mediator. If no settlement agreement is reached in the mediation process, the mediator should inform the participants that the mediator may be called as a witness and evidence can be led in court. The participants should, however, be discouraged or prohibited from doing so in the Agreement to Mediate between the mediator and the participants.

3.7.4 The mediator must 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, the mediator should explain how the information received will be used.

3.8 Independent advice and information:

3.8.1 The mediator should 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.

3.8.2 The mediator should advise the participants to seek independent legal advice prior to resolving the issues and formalising an agreement.

3.8.3 A mediator should, however, not give the participants expert advice. A mediator should only provide the participants with information and only in those areas where he or she is qualified by training or experience to give such information.

3.9 Appropriateness of mediation:

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

3.10 Party autonomy:

3.10.1 The mediator may provide information about the process, raise issues, and help explore options. The primary role of the mediator is, however, to assist the participants to reach a voluntary resolution of the dispute.

3.10.2 The mediator may not coerce any participant into an agreement and should never make decisions for any participant in the mediation process.

3.10.3 The mediator has no vested interest in the outcome of the mediation. Therefore, the mediator must encourage the participants to develop their own solution to the dispute.

3.10.4 The mediator may, however, suggest options for the participants to consider if the suggestions do not affect the participants' self-determination or the mediator's impartiality.

3.10.5 The mediator must promote a balanced process and encourage the participants to conduct the mediation in a collaborative and non-adversarial manner.

3.11 Concluding mediation:

3.11.1 Full agreement (includes “Memorandum of Understanding”):

3.11.1.1 The mediator must discuss with the participants the process for formalisation and implementation of the agreement.

3.11.1.2 Prior to the participants entering into a mediated agreement, the mediator must determine that: -

- i. the participants have considered all that the agreement involves and the possible implications of the agreement; and
- ii. the participants have entered into the agreement voluntarily.

3.11.1.3 The mediator must encourage review of any agreement by an independent legal adviser for each of the participants prior to the mediated agreement being signed by the participants.

3.11.1.4 If a mediator has concerns about the possible consequences of a proposed agreement or that any participant does not fully understand the terms of the agreement or its implications, the mediator must raise these concerns with the participants.

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

3.11.2 Partial agreement:

When the participants reach a partial agreement, the mediator must discuss with them the procedures available to resolve the remaining issues.

3.11.3 No agreement due to termination by any or all of the participants:

The mediator must inform the participants of their right to withdraw from mediation at any time and for any reason.

3.11.4 No agreement due to termination by the 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 or terminate the mediation and encourage the participants to seek appropriate professional help.

3.11.5 No agreement due to impasse:

If the mediator is unable to assist the participants to break an impasse, the mediator should not prolong unproductive discussions that would result in emotional and monetary costs to the participants.

3.12 Quality of the process:

3.12.1 A mediator must conduct the mediation diligently and should not prolong the mediation for the purpose of increasing fees.

3.12.2 Under no circumstances is a mediator entitled to overreach when charging participants.

3.12.3 If, in a mediator's judgement, the integrity of the process has been compromised by, for example, the inability or unwillingness of a party to participate meaningfully, gross inequality of bargaining power, gross unfairness resulting from non-disclosure of relevant information, or fraud by a participant, the mediator must discontinue the mediation and maintain confidentiality.

3.13 Bar to mediating:

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

- 3.13.1 Where the mediator or a member of his or her organisation, firm, practice or family has a direct personal or financial interest in the outcome of the mediation.
- 3.13.2 Where the mediator or a member of his or her organisation has at any time provided legal advice or any other professional advice, support, or representation for any one party individually before the mediation concerning any issue that may arise in the mediation.
- 3.13.3 Where the mediator has at any time had a therapist/client or counsel/client relationship or attorney/client relationship with only one of the participants.
- 3.13.4 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 participants to mediation.
- 3.13.5 Where the mediator is aware that for personal or other reasons, he/she will not be able to mediate in an impartial way or, despite informed consent, is likely to be perceived as being unable to do so.

4. SPECIAL POLICY CONSIDERATIONS IN FAMILY LAW MATTERS AND DISPUTES AFFECTING CHILDREN AND OTHER VULNERABLE ADULTS

4.1 Policy considerations:

Mediators must take cognisance of the special policy considerations that apply in family law matters and disputes affecting children and other vulnerable people, namely the best interests of children, equality and non-discrimination.

4.2 Mediator's duty towards children and vulnerable adults:

A mediator does not only have a duty towards the participants, but also towards third parties who might be affected by a mediated settlement such as children or other vulnerable people including the elderly and people with disabilities.

4.3 Less strict application of certain principles of mediation ethics:

In family mediation principles of mediation ethics, such as mediator neutrality and impartiality and party autonomy, must be seen in the light of these policy considerations and cannot apply strictly.

4.4 Mediator to promote consideration of the interests of children and vulnerable adults:

A mediator must promote consideration of the interests of children and vulnerable people affected by actual or potential agreements who are not present or represented at the mediation.

4.5 Principle of the best interests of the child:

4.5.1 The principle of the best interests of children overshadows the family mediation process and in terms of section 28(2) of the Constitution of the Republic of South Africa, 1996 a child's best interests are of paramount importance in every matter concerning the child.

4.5.2 Whenever children are involved in a matter, a very specific form of mediation, namely child-informed mediation, must be utilised. Child-informed mediation adds an explicit focus on the child to the mediation process and is designed to include children's perspectives and to motivate parents to focus on their children's needs.

- 4.5.3 In child-informed mediation it is imperative to hear and acknowledge the voices of children, either directly or indirectly through a child specialist.
- 4.5.4 Mediators who are not specifically trained to deal with children and obtain their voices should contract the services of specifically trained social workers or psychologists to obtain the voice of the child.
- 4.5.5 Prior to participants entering into a mediated agreement, the mediator must determine that the participants have heard and acknowledged the views, wishes and opinions of the children in an appropriate manner.
- 4.5.6 A mediator must ensure that all decisions made and conclusions and agreements reached by the participants in the mediation process are in the best interests of any children involved in a matter.
- 4.5.7 If a mediator believes that the participants are not considering the best interests of any children involved in a matter, the mediator must suspend or terminate the mediation.

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 or other mediators without first endeavouring to consult with the person or persons conducting such mediation. The mediator must ensure that the mandate of the previous mediator/s has/ve been terminated and fees have been paid before he or she takes on the matter.

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 collaborative 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 and collaboration 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/she/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 a 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 (SAAM) in writing.

6. BREACH

Any breach of any clause which is contained in this document may result in the suspension or termination of membership in SAAM.

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