

AUSTRALIAN NATIONAL MEDIATOR STANDARDS

PRACTICE STANDARDS

FOR MEDIATORS OPERATING UNDER THE NATIONAL MEDIATOR
ACCREDITATION SYSTEM

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Practice Standards

1 Application

- 1) These Practice Standards apply to any mediator acting as a third party to support two or more individuals or entities to manage, settle or resolve disputes, or to form a future plan of action through a process of mediation and who voluntarily decides to become accredited under the National Mediator Accreditation Scheme. Practitioners who act in these roles are referred to in these Practice Standards as mediators. A mediator supports participants in a mediation process to identify, clarify and explore issues, to generate and consider options and to make decisions about future actions and outcomes. The Practice Standards are intended to govern the relationship of mediators with the participants in the mediation, their professional colleagues, courts and the general public so that all will benefit from high standards of practice in mediation.
- 2) The Practice Standards:
 - a) specify practice and competency requirements for mediators; and
 - b) inform participants and others about what they can expect of the mediation process and mediators.
- 3) Mediators voluntarily accredited under the Australian National Mediator Standards must comply with the Approval Standards as well as the Practice Standards. These Practice Standards should be read in conjunction with the Approval Standards.
- 4) There are a range of different mediation models in use across Australia. As noted in the Approval Standards, mediation can take place in all areas where decisions are made. For example, mediation is used in relation to commercial, community, workplace, environmental, construction, family, building, health and educational decision making. Mediation may be used where there is conflict or may be used to support future decision making. Mediators are drawn from diverse backgrounds and disciplines. Mediation may take place as a result of Court or Tribunal referral, pre-litigation schemes, through industry schemes, community based schemes as well as through private referral, agency, self or other referral. These Practice Standards set out minimum practice requirements and recognise that some mediators who practice in particular areas of with particular models may choose to develop or comply with additional standards or requirements. Mediators may practice as 'solo' mediators or may co-mediate with another mediator.

- 5) Where mediators practice under existing legislative frameworks and there is a conflict between the requirements of these Practice Standards and any legislation, the respective legislative requirements will override those of the Practice Standards to the extent of any inconsistency.

2 Description of a Mediation Process

The purpose of a mediation process is to maximise participants' decision making.
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- 1) A mediation process is a process in which the participants, with the support of a mediator, identify issues, develop options, consider alternatives and make decisions about future actions and outcomes. The mediator acts as a third party to assist the participants to reach their decision.
- 2) Mediation processes are not a substitute for individual or organisational legal and/or other expert advice, or individual counselling or therapy. Mediation processes may not be appropriate for all disputants or all types of disputes.
- 3) The goal of a mediation process is agreed upon by the participants with the assistance of the mediator. Examples of goals may include assisting the participants to make a wise decision, to clarify the terms of a workable agreement and/or future patterns of communication that meet the participants' needs and interests, as well as the needs and interests of others who are affected by the dispute.
- 4) The mediation process may:
 - a) assist the participants to define and clarify the issues under consideration;
 - b) assist participants to communicate and exchange relevant information;
 - c) invite the clarification of issues and disputes to increase the range of options;
 - d) provide opportunities for understanding;
 - e) facilitate an awareness of mutual and individual interests;
 - f) help the participants generate and evaluate various options; and
 - g) promote a focus on the interests and needs of those who may be subject to, or affected by, the situation and proposed options.
- 5) Mediators do not advise upon, evaluate or determine disputes. They assist in managing the process of dispute and conflict resolution whereby the participants agree upon the outcomes, when appropriate. Mediation is essentially a process that maximises the self determination of the participants. The principle of self determination requires that mediation processes be non-directive as to content.
- 6) Some mediation processes may involve participants seeking expert information from a mediator which will not infringe upon participant self-determination. Such information is deemed to be consistent with a mediation process if that information is couched in general and non-prescriptive terms, and presented at a stage of the process which enables participants to integrate it into their decision making. Such information might include the provision of general information and a reference to available material that could assist the participants. For example, a referral to resources that could be used by parents in a family dispute to determine the impact of options upon children or other family members.

- 7) Some mediators may use a ‘blended process’ model whereby they provide advice. These processes are sometimes referred to as ‘advisory mediation’, ‘evaluative mediation’ or ‘conciliation’. Such processes may involve the provision of expert information and advice, provided it is given in a manner that enhances the principle of self-determination and provided that the participants request that such advice be provided. Mediators who provide expert advice are required to have appropriate expertise (see Approval Standards at Section 5 (4)) and to obtain the consent of participants prior to providing any advisory process.

3 Starting a Mediation Process

Before mediating, a mediator should ensure that an outline of the mediation process has been given to the participants.

- 1) The diversity in mediation practice means that there are considerable differences in terms of how participants enter into a mediation process. Where mediators are bound by existing professional or organisational requirements relating to entry into a mediation process and to the extent that such professional or organisational requirements contradict with the Practice Standards, the existing professional or organisational requirements should prevail.
- 2) Prior to the mediation taking place, the mediator will ensure that the participants have been provided with an explanation of the process and have had an opportunity to reach agreement about the way in which the process is to be conducted. This may take place in an intake process that is held separately from a mediation session. The person conducting the intake process may be a different person to the mediator.
- 3) The objectives of an intake process may include:
 - a) Determining whether mediation is appropriate and whether variations are required (for example, using an interpreter or a co-mediation model in culturally and linguistically diverse communities or varying arrangements where violence is an issue).
 - b) Assisting the participants to prepare for the process. Participants who are prepared and who have received relevant advice are in the best position to make an informed decision when attending a mediation.
 - c) Ensuring that every participant receives information about the roles of each party in the mediation; this discussion may involve questions relating to the role of lawyers, support people and others.
 - d) Checking whether any information needs to be exchanged, how this can be done and what information, documents or things need to be available during the mediation process.
 - e) Settling any preliminary procedural issues, for example:
 - i) what documents/notes will be kept by the mediator?
 - ii) will the process be confidential (if it is an internal process, what reporting will take place)?
 - iii) will the participants have authority to negotiate?
 - f) Clarifying the terms of any agreement to enter into the process.

- g) Settling venue and timing issues.
- 4) The mediator should:
- a) describe and explain the mediation process that is to be used;
 - b) where necessary, discuss the appropriateness of the process for the participants in light of their particular circumstances, the benefits and risks of the process, and the other alternatives open to the participants;
 - c) discuss the confidentiality of the mediation and any limitations on such confidentiality;
 - d) advise the participants about how they or the mediator can suspend or terminate the mediation;
 - e) reach agreement with the participants about any costs and how such costs are to be paid;
 - f) advise the participants about any indemnity provisions contained in any agreement to mediate, for example, where a mediator seeks to be indemnified in respect of his or her costs in response to any legal costs that may be incurred by the mediator;
 - g) advise the participants of the mediator's role in relation to the provision of advice or other services for example:
 - i) if the mediator is also a lawyer, he or she shall inform the participants that he or she cannot provide legal advice unless using a 'blended process' model and with their clear consent or represent any of the participants in any related legal action,
 - ii) if the mediator is a psychologist, counsellor or therapist, he or she shall inform the participants that he or she cannot counsel or practise therapy with either or any of the participants.
 - h) discuss with or inform the participants about the procedures and practices in the mediation, such as:
 - i) the circumstances under which separate sessions may be held,
 - ii) how participants may seek information and advice from a variety of sources during the process,
 - iii) how participants may withdraw from the process,
 - iv) that participants are not required to reach an agreement,
 - v) the opportunities for separate communication with the participants and/or with their legal representatives,
 - vi) the circumstances in which other persons can be involved in the process, for example, the participation of experts, support persons or interpreters who may be involved in the mediation.
- 5) Wherever considered beneficial by the participants, the agreement to enter into mediation will be in writing. Any agreement with respect to the confidentiality of a session, or any waiver of such confidentiality, may also be acknowledged in writing by all participants. If there is no written agreement, for example, where mediation is conducted by a Court or Tribunal member and is governed by legislation, then the mediator will record the participants' understanding as to entry into the process and confidentiality.
- 6) Mediators will provide the participants with a copy of these Practice Standards, or advise where and how they can be accessed, for example, by referring to a web site.

4 Power Issues

Mediators shall have completed training that assists them to recognise power imbalance and issues relating to control and intimidation and take appropriate steps to manage the mediation process accordingly.

- 1) Some disputes may not be appropriate for mediation processes because of power imbalance, safety, control and/or intimidation issues.
- 2) If at any time abuse is present, or implied or threatened, the mediator shall take appropriate measures to ensure the safety of participants. Options include:
 - a) activating appropriate pre-determined security protocols;
 - b) using video conferencing or other personal protective and screening arrangements;
 - c) requiring separate sessions with the participants;
 - d) enabling a friend, representative, advocate, or legal representative to attend the mediation sessions;
 - e) referring the participants to appropriate resources; and
 - f) suspending or terminating the mediation session, with appropriate steps to protect the safety of the participants.

5 Impartial and Ethical Practice

A mediator must conduct the dispute resolution process in an impartial manner and adhere to ethical standards of practice.

- 1) Impartiality means freedom from favouritism or bias either in word or action, or the omission of word or action, that might give the appearance of such favouritism or bias. A mediator will disclose actual and potential grounds of bias and conflicts of interest. The participants shall be free to retain the mediator by an informed waiver of the conflict of interest. However, if in the view of the mediator, a bias or conflict of interest impairs their impartiality, the mediator will withdraw regardless of the express agreement of the participants.
- 2) A mediator should identify and disclose any potential grounds of bias or conflict of interest that emerge at any time in the process. Clearly, such disclosures are best made before the start of a process and in time to allow the participants to select an alternative mediator. Mediators should take reasonable steps to minimise the chances of being in a position of potential bias or conflict of interest before the process commences.
- 3) A mediator should avoid conflicts of interest, or potential grounds for bias or the perception of a conflict of interest, in recommending the services of other professionals. Where possible, the mediator should provide several alternatives if recommending referrals to other practitioners and services.
- 4) A mediator will not use information about participants obtained in mediation for personal gain or advantage.

- 5) The perception by one or both of the participants that the mediator is partial does not in itself require the mediator to withdraw. In such circumstances, however, the mediator must remind all parties of a right to terminate the mediation process.
- 6) A mediator should not become involved in relationships with parties that might impair the practitioner's professional judgment or in any way increase the risk of exploiting clients. Except where culturally required, practitioners will not facilitate disputes involving close friends, relatives, colleagues/supervisors or students.
- 7) Mediators should adhere to, and be familiar with, the code of conduct or ethical standards prescribed by the organisation or association with which they have membership (see Approval Standards).

6 Confidentiality

A mediator should respect the confidentiality of the participants.
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- 1) A mediator shall not voluntarily disclose to anyone who is not a party of the mediation any information obtained except:
 - a) non-identifying information for necessary administrative, research, supervisory or educational purposes; or
 - b) with the consent of the participants to the mediation process; or
 - c) when required to do so by law; or
 - d) where permitted by existing ethical guidelines or requirements and the information discloses an actual or potential threat to human life or safety.
- 2) The mediator will clarify the participants expectations of confidentiality before undertaking the mediation process. Any written agreement to enter into the process should include provisions concerning confidentiality.
- 3) Before undertaking the mediation process, the mediator will inform the participants of the limitations of confidentiality, such as statutory, judicially or ethically mandated reporting, such as any reporting required pursuant to professional ethical requirements.
- 4) If the mediator holds separate sessions with a participant, the obligations of confidentiality concerning those sessions should be discussed and agreed upon before the sessions.
- 5) If subpoenaed, or otherwise notified to testify or to produce documents, the mediator should attempt to inform the participants as soon as reasonably practicable. The mediator should not give evidence without an order of the Court or Tribunal if the mediator reasonably believes doing so would violate an obligation of confidentiality to the participants. The mediator may include indemnification provisions in relation to costs incurred (see Section 3(2)(f)).
- 6) With the participants' consent, the mediator may discuss the mediation process with the participants' lawyers and other expert advisors where such advisors have not attended all or part of the actual mediation session.

- 7) Where the participants reach an agreement in a mediation process, the substance of the proposed agreement may, with the permission of participants, be disclosed to their respective representatives, advisors or others and may be used in a de-identified form for debriefing, research processes and discussion purposes.
- 8) The mediator should maintain confidentiality in the storage and disposal of client records and must ensure that office and administrative staff maintain such confidentiality. Overall, mediators are not required to retain documents relating to a dispute although they may retain any written agreement to enter into the mediation process and any written agreement as to outcomes. Some mediators may also choose to retain notes relating to the content of the dispute particularly where duty-of-care or duty-to-warn issues are identified.

7 Competence

Mediators must be competent and have relevant skills and knowledge.

- 1) Mediators should seek regular professional debriefing. The purpose of debriefing is to address matters relating to skills development, conceptual and professional issues, ethical dilemmas, and to ensure the ongoing emotional health of mediators. Debriefing can take place following a solo mediation, a co-mediation, in groups or through independent sessions with another experienced mediator.
- 2) Mediators should also participate in continuing professional development training. Where possible, mediators should also participate in programs of peer consultation and should help train and mentor the work of less experienced mediators.
- 3) Mediators should be competent and have the capacity to apply knowledge, skills and an ethical understanding and commitment in the areas listed below. Mediators demonstrate competence by showing that they have the requisite knowledge and skills and can apply them. Mediators are required to ensure that ongoing professional development is focused on achieving and maintaining competencies including:
 - a) KNOWLEDGE

In areas including, but not limited to:

 - i) The nature of conflict, including the dynamics of power and violence.
 - ii) The appropriateness or inappropriateness of mediation.
 - iii) Pre-mediation preparation, screening and intake.
 - iv) Communication patterns in conflict and negotiation situations.
 - v) Negotiation dynamics in mediation.
 - vi) Cross-cultural issues in mediation and dispute resolution.
 - vii) The principles, stages and functions of a mediation process.
 - viii) The roles and functions of mediators.
 - ix) The roles and functions of support persons, lawyers and other professionals in mediation.
 - x) The law of mediation on confidentiality, enforceability of mediated agreements and liability of mediators.

- b) **SKILLS**, including, but not limited to:
 - i) Preparation and dispute diagnosis in mediation.
 - ii) Intake and screening of both the parties and the dispute to assess suitability for mediation.
 - iii) Conduct and management of the mediation process.
 - iv) Appropriate communication skills, including listening, questioning, reflecting and summarising, required for the conduct of mediation.
 - v) Negotiation techniques and the mediator's role in facilitating negotiation and problem-solving.
 - vi) Mediator interventions appropriate for standard difficulties in mediation
 - vii) Potential responses to high emotion, power imbalances and violence.
 - viii) Use of separate meetings and shuttle mediation.
 - ix) Asking questions about or in appropriate circumstances, drafting of mediated agreements.

- c) **ETHICAL UNDERSTANDINGS** in relation to:
 - i) The avoidance of conflicts of interest.
 - ii) Marketing and advertising of mediation.
 - iii) Confidentiality, privacy and reporting obligations.
 - iv) Neutrality and impartiality.
 - v) Fiduciary obligations.
 - vi) Supporting fairness and equity in mediation.
 - vii) Withdrawal from and termination of the mediation process.

8 Inter-professional Relations

Mediators should respect the relationships with professional advisers, other mediators and experts which complement their practice of mediation.
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- 1) Mediators should promote cooperation with other professionals and encourage clients to use other professional resources when appropriate.
- 2) When disputes involve more than one facilitative or other decision-making process, mediators will keep themselves informed and keep other professional colleagues informed about the processes taking place. Mediators will consider and respond to any consultative responsibilities that extend beyond more narrowly defined obligations to facilitate a process directly between the disputants.

9 Procedural Fairness

A mediator will conduct the mediation process in a procedurally fair manner.

- 1) A mediator will support the participants to reach any agreement freely, voluntarily, without undue influence, and on the basis of informed consent.
- 2) The mediator will provide each participant with an opportunity to speak and to be heard in the mediation, and to articulate his or her own needs, interests and concerns.
- 3) If a mediator, after consultation with a participant, believes that a participant is unable or unwilling to participate in the process, the mediator may suspend or terminate the mediation process.
- 4) The mediator should encourage and support balanced negotiations and should understand how manipulative or intimidating negotiating tactics can be employed by participants.
- 5) To enable negotiations to proceed in a fair and orderly manner or for an agreement to be reached, if a participant needs either additional information or assistance, the mediator must ensure that participants have sufficient time and opportunity to access sources of advice or information.
- 6) Participants should be encouraged, where appropriate, to obtain independent professional advice or information.
- 7) It is a fundamental principle of the mediation process that competent and informed participants can reach an agreement which may differ from litigated outcomes. The mediator, however, has a duty to support the participants in assessing the feasibility and practicality of any proposed agreement in both the long and short term, in accordance with the participant's own subjective criteria of fairness, taking cultural differences and where appropriate, the interests of any vulnerable stakeholders into account.
- 8) The primary responsibility for the resolution of a dispute rests with the participants. The mediator will not pressure participants into an agreement or make a substantive decision on behalf of any participant.

10 Information Provided by the Mediator

The mediator has no advisory or determinative role in regard to the content of the matter being mediated or its outcome. The mediator can advise upon and determine the mediation process that is used.

- 1) Consistent with the standards relating to impartiality and preserving participant self-determination, a mediator may, with the clearly informed consent of the participants, provide the participants with information that the mediator is qualified by training or experience to provide. Such information should be couched in general terms.
- 2) A mediator should only provide information within the limits of his or her qualifications and competence while conducting a mediation.
- 3) Mediators shall not explore or provide interpretations of behaviour or statements with the aim of providing assistance of a counselling nature nor should they provide legal advice (see ss5 below).
- 4) Where appropriate, for example, in some family, environmental and workplace disputes, the mediator has a responsibility to facilitate a discussion about the participants' awareness of the interests of others affected by the dispute, and by the proposed agreement, and to assist the participants to consider the separate and individual needs of other such persons.
- 5) If a mediator, upon request, uses a 'blended process' model, such as evaluative mediation or conciliation, this process must be the subject of clear consent normally through the use of a mediation or similar agreement.
- 6) Mediators will provide information about their specialist and relevant training, education and expertise to participants upon request.

11 Termination of the Mediation Process

The mediator may suspend or terminate a mediation process if continuation of the process might harm or prejudice one or more of the participants.

- 1) Mediators should be alert to situations where parties or their advisors seek to misuse the mediation process to achieve other ends such as:
 - a) delaying proceedings in the hope of reinforcing the continuation of an existing arrangement or prolong litigation or obtain other advantage; or
 - b) 'buying' time in order to dissipate or conceal assets; or
 - c) where, in the opinion of the mediator, one or both participants is in some other way acting in bad faith.
- 2) A mediator may suspend or terminate the mediation process if in the opinion of the mediator it is being used for a purpose other than a mutual attempt to arrive at resolution or its usefulness has in some other way been exhausted. Mediators should, where possible, provide reasonable notice to the participants.

- 3) The mediator may withdraw from the mediation process when any agreement is being reached by the participants that the mediator believes is unconscionable. If terminating or withdrawing from a mediation process, the mediator should assist the parties in assessing further process options for dealing with their dispute.

12 Charges for Services

The mediator should make explicit to parties all charges related to the practitioner's services and how they are calculated.

- 1) The mediator will explain any fees to be charged for the mediation process and any related costs. The mediator must also obtain agreement from the participants as to how any fees will be shared and the method of payment.
- 2) Any written agreement with the participants about the mediation process should include a description of any fee arrangements with the mediator.
- 3) A mediator will not base fees on the outcome of the mediation, but it is not unethical for a mediator to act pro bono or to leave to the discretion of the parties the payment of any fees.
- 4) If any retainer has been collected before mediation services have been rendered, any unearned fees should be returned promptly upon termination of the mediation process.

13 Making Public Statements and Promotion of Services

The mediator should ensure that public statements made by the mediator promoting business are accurate.

- 1) The purpose of public statements concerning mediation processes should be to:
 - a) educate the public about the process in order to help the public make informed judgments and choices; and
 - b) present the mediation process objectively, as one which seeks to empower participants directly and constitutes only one of several methods for arriving at an outcome.
- 2) Public communications should not mislead the public, misrepresent facts or contain any:
 - a) statements likely to mislead or deceive by making only a partial disclosure of relevant facts; or
 - b) statements intended or likely to create false or unjustified expectations of favourable results.
- 3) When advertising professional services, mediators should restrict themselves to matters which educate and inform the public. These could include the following information to describe the mediator and the services offered, such as: name, address, telephone and facsimile numbers, email address, office hours, relevant academic degree(s), specialist subject expertise, relevant training and experience in the

mediation process, mediation qualifications such as certifications and accreditations, appropriate professional affiliations and membership status, advantages of a mediation process, and any additional relevant or important consumer information. In particular:

- a) mediators should refrain from promises and guarantees of results. However, a mediator may report on de-identified information about any evaluation of their services that might assist parties to better understand the mediation process; and
 - b) mediators must accurately represent their qualifications and their relevance and significance.
- 4) Mediators should, where possible, encourage and/or participate in research that can support further professional and public education.
 - 5) Mediators can promote their accreditation or additional accreditation and membership under this system.