

Montana Mediation Association

Code of Ethics & Standards of Practice

PREFACE

Mediation is a process in which an impartial third party - a mediator - facilitates the resolution of a dispute by promoting mutual, voluntary and informed agreement through self-determination by the parties to the dispute. A mediator facilitates communication, promotes understanding, focuses the parties on their interests, and fosters creative problem solving to enable the parties to reach their own agreement and may offer information and ideas to facilitate discussion. It is common for a mediator to be an attorney, a mental health professional, or other professional, but as a mediator the professional shall not offer advice or render a decision on the issues in dispute. The primary responsibility for the resolution of a dispute rests with the parties.

The Montana Mediation Association (MtMA) Code of Ethics and Standards of Practice are intended to perform three major functions: to serve as a guide for the conduct of MtMA Certified Mediators; to inform mediating parties; and to promote public confidence in mediation as a process for resolving disputes. Montana Mediation Association's Code of Ethics and Standards of Practice draw on existing codes of conduct for mediators and take into account issues and problems that have surfaced in mediation practice.

These guidelines are recommended for all mediators. Specifically excepted from MtMA's Code of Ethics and Standards of Practice are those mediators whose functions are already recognized and proscribed in statutes, in executive, judicial or administrative rule, or through qualifications established by an executive branch agency providing mediation assistance.

Some mediators are members of other professions (e.g., therapists, attorneys, social workers) which have obligations under other codes of ethics. When these professionals are performing mediation, they should disclose any and all guidelines, which they must follow. If the ethical guidelines for each profession are in conflict with one and other, then that conflict must be disclosed.

I. INITIATING THE PROCESS

A. Definition and Description of Mediation

A 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 distinguish it from therapy, counseling, settlement conferencing, arbitration, and advocacy.

B. Identification of Issues

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

C. Appropriateness of Mediation

A mediator shall help the participants evaluate the benefits, risks, and costs of mediation and the alternatives available to them. Mediators should be aware of the range of procedures for dispute resolution and the conditions under which each may be more effective. These procedures include, but are not limited to, negotiation, attorney assisted negotiation, litigation through jury trial, arbitration,

settlement conferencing, collaborative law, and therapy. As deemed appropriate in each situation, mediators should discuss procedural options with participants so as to help them wisely choose the most appropriate process. The process should match the type of outcome that is desired by the parties.

D. Mediator's Duty of Disclosure

1. Biases

A mediator shall disclose to the participants any biases or strong views relating to the issues to be mediated.

2. Training and Experience

A mediator's education, training, and experience to mediate the subject matter should be accurately described to the participants.

3. Limits of Confidentiality

A mediator shall disclose any limits on confidentiality, particularly those described in Section IV.

4. Termination of Mediation

A mediator shall disclose the conditions under which the mediation may be terminated, particularly those described in Section IX, and X (B)

E. Procedures

If possible, prior to, but no later than, the opening session, a 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 of holding separate meetings between a participant and the mediator, confidentiality, use of legal services, the involvement of additional parties, and the termination of the mediation by one or both the parties or the mediator. This provision does not preclude a different agreement between the parties and the mediator regarding termination of the mediation, nor does it apply if a court order provides otherwise.

At a minimum, a mediator should inform the parties of the following:

- a) Mediation is private. Unless otherwise agreed by the participants, only the mediator, the parties, their representatives, and/or their advocates are allowed to attend;
- b) Mediation is informal. There are no court reporters present, no record is made of the proceedings, no subpoena or other service of process is allowed, and no rulings are made on the issues or the merits of the case;
- c) Mediation is confidential to the extent provided by law;
- d) Mediation is voluntary.

Unless the parties agree otherwise, a mediator should not initiate the mediation process unless all parties and their representatives are present. The parties must represent to a mediator that they possess adequate authority to negotiate an agreement and that an adequate amount of time has been reserved by all parties to allow the mediation process to be productive.

F. Independent Legal Counsel

A mediator shall inform the participants of the possible need to employ independent legal counsel for advice throughout the mediation process and shall determine if they are represented by independent legal counsel. A mediator shall inform the participants that she/he cannot represent either or both of them in any legal action, including a marital dissolution. A mediator should not convene the mediation if the mediator has reason to believe that an unrepresented party fails to understand that the mediator is not providing legal representation for that party.

G. Mutual Duties and Responsibilities

A mediator and the participants shall agree upon the duties and responsibilities that each is accepting in the mediation process. An example of these duties might be the participant's duty to negotiate in good faith and the mediator's responsibility to be impartial. This agreement may be written or verbal. The duties and responsibilities of each participant should be clear.

H. Mediator's Role

A mediator is a listener/attender, facilitates the process, fosters communication between the parties, assists the parties in problem solving, clarifies and frames the issues and interests of the parties, acts as an unbiased, objective and neutral observer, helps the parties to evaluate the feasibility of their agreements, and assists closure of the dispute and agreement.

II. NEUTRALITY AND IMPARTIALITY

A. Neutrality

Neutrality refers to the attitude that the mediator has toward all issues in the mediation. Neutrality means freedom from favoritism or bias, either in word or action. Neutrality implies a commitment to aid all participants, as opposed to a single individual, in reaching a mutually satisfactory agreement. Neutrality means that a mediator will not play an adversarial role.

A mediator has a responsibility to maintain neutrality while raising questions for the parties to consider as to the fairness, equity, and feasibility of proposed options for settlement.

B. Impartiality

Impartiality refers to the relationship that the mediator has with the participants in a mediation. If a mediator feels, or anyone of the participants states, 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. A mediator must avoid the appearance of conflict of interest both during and after the mediation.

1. Prior Relationship

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 to one of the participants, unless the prior relationship has been discussed, the role of the mediator made distinct from the earlier relationship and the participants have been given the opportunity to freely choose to proceed.

2. Relationship to Participants

Without the consent of all legally available parties, a mediator shall not subsequently establish a professional (examples of "professional" are attorney-client, therapist-patient) relationship with anyone of the parties in a related matter, or in an unrelated matter, under circumstances which would raise legitimate questions about the integrity of the mediation process.

3. Conflicts of Interest

A mediator should disclose any circumstance to the participants which might cause a conflict of interest.

4. Subsequent Court Service

Unless in exceptional circumstances, a person serving as a mediator should not subsequently serve as a judge, master, guardian ad litem, attorney ad litem or in any other judicial or quasi-judicial capacity in matters that are the subject of the mediation.

III. COSTS AND FEES

A. Explanation of Fees

As early as practical, in the initial contact or correspondence, and before any fee generating mediation session begins, a mediator should explain all fees and other expenses to be charged for mediation. The issue of fees should not be an issue in the mediation and should be resolved before the mediation session begins. The parties or the court may, however, determine the ultimate portion of the mediator's fees to be paid by each party. If a party and the mediator have a dispute that cannot be resolved before commencement of the mediation as to the mediator's fee, the mediator should decline to serve so that the parties may obtain another mediator.

B. Reasonable Fees

When setting fees, a mediator shall ensure they are explicit, fair, reasonable, and commensurate with the service to be performed. Unearned fees should be promptly returned to the clients.

C. Contingent Fees

It is inappropriate for a mediator to charge fees contingent on results or to base fees on the outcome of mediation.

D. Referrals and Commissions

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

IV. CONFIDENTIALITY AND EXCHANGE OF INFORMATION

A. Confidentiality

The importance of confidentiality is related, in part, to the full and open disclosure necessary for the mediation process. A mediator shall not reveal information made available in the mediation process, since all such information is privileged and confidential, unless the affected parties agree otherwise or as may be required by law. A mediator shall foster the confidentiality of the process. Confidentiality begins with the first contact between mediator and any party and continues forever.

1. Exchange of Information

A mediator shall encourage a full and complete exchange of information between parties. A mediator shall treat all information obtained in caucus as privileged and confidential unless the party agrees to share the information with the other party.

2. Limits of Confidentiality

In relevant cases, a mediator must inform the parties that he or she is compelled by law to report to appropriate authorities information about spousal or child abuse, neglect or abandonment. A mediator may report any conduct to the appropriate authorities if the possibility of such a reporting has been previously disclosed to the participants in writing.

3. Appearing in Court

A mediator shall refrain from testifying at court proceedings without the consent of all parties. However, the mediator shall explain to the parties that the mediator may be compelled to testify as result of judicial rule. A mediator should report to the court only the following: whether the mediation occurred, whether the mediation resulted in a settlement, and whether the mediation was recessed, rescheduled or terminated. No other information regarding the parties or the process shall be reported.

4. Consequences of disclosure of facts between parties

A mediator shall advise the participants that the mediation sessions are confidential settlement negotiations and that all written and oral communications, negotiations, statements made in the course of the mediation are made without compromising any party's legal position, are not discoverable, and shall be inadmissible for any purpose at any legal proceeding. A mediator shall also advise the participants that matters that are otherwise admissible in a court of law may not be made inadmissible because they have been discussed in the mediation session.

B. Release of Information

A mediator shall obtain the consent of the participants prior to releasing information to others.

A mediator shall maintain confidentiality and render anonymous all identifying information when materials are used for research or training purposes.

C. Caucus with Third Parties

In the event that a mediator, upon the consent of the participants, speaks privately with any person not represented in mediation, including children, the mediator shall define with the participants and disclose to the unrepresented person how the information received will be used before any meeting has begun.

D. Storage and Disposal of Records

A mediator shall maintain confidentiality in the storage and disposal of records.

V. FULL DISCLOSURE

While a mediator should encourage disclosure of all relevant information in the mediation process as could reasonably occur in the judicial discovery process, only a court can order discovery and

placing such a responsibility on the mediator creates an unnecessary burden. If a mediator believes the parties are not acting in good faith, he/she may suspend or terminate the process.

VI. SELF DETERMINATION

A. Responsibilities of the Participants and the Mediator

The primary responsibility for the resolution of a dispute rests with the participants. A mediator's obligation is to assist the disputants in reaching an informed and voluntary settlement. At no time shall a mediator pressure or coerce a participant into agreement, nor shall a mediator make a substantive decision for any participant, make a recommendation as to a course of action, or give a substantive opinion as to the best course of action for a participant. The mediator may provide information, as described in Section VII.B., in a neutral matter for the consideration of the participants, but the information shall not be presented in the form of a recommended course of action.

B. Responsibility to Third Parties

In family mediations, the mediator has a responsibility to promote the participants' consideration of the interests of children and other persons affected by the agreement. A mediator also has a duty to assist parents to examine, apart from their own desires, the separate and individual needs of such people.

VII. PROFESSIONAL ADVICE

A mediator should not give legal or other professional advice to the parties.

A. Independent Advice and Information

A mediator shall encourage and assist the participants to obtain independent expert information and advice when such information is needed to reach an informed agreement to protect the rights of a participant or assist in a determination as to the best interest of children or other affected third parties.

B. Providing Information

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

C. Independent Legal Counsel

When the mediation may affect legal rights or obligations, the mediator shall advise the participants to seek independent legal counsel prior to resolving the issues and in conjunction with formalizing an agreement. A mediator shall explain generally to parties without legal representation that there may be risks in proceeding without independent counsel or other professional advisors.

VIII. PARTIES' ABILITY TO NEGOTIATE

A mediator shall assure that each participant has had an opportunity to understand the implications and ramifications of available options. In the event 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 may refer the individual to appropriate resources, while clarifying that it is ultimately the party's right to determine his/her need for more information.

A. Procedural

A mediator has a duty to assure balanced negotiations and should not permit manipulative or intimidating negotiation techniques.

B. Psychological

A mediator shall explore whether the participants are capable of participating in informed negotiations. While a party's statements regarding his/her capability to participate in informed negotiations shall be considered, the mediator has the responsibility to determine that each party is capable. If a mediator concludes that a party is temporarily or permanently incapable, the mediator may postpone a mediation session and/or withdraw from the mediation process and/or refer the parties to appropriate resources, if necessary.

IX. QUALITY OF THE PROCESS

A mediator shall work to ensure a quality process and to encourage mutual respect among the parties. A quality process requires a commitment by the mediator to diligence and procedural fairness. There should be adequate opportunity for each party in the mediation to participate in the discussions. The parties decide when and under what conditions they will reach an agreement or terminate a mediation.

A mediator shall withdraw from a mediation if he/she knows that the mediation is being used to further criminal conduct.

If, in the opinion of a mediator, the process is impeded by a party's use of a drug, alcohol or by other physical or mental incapacity, the mediator shall postpone a mediation session and/or withdraw from the mediation process and/or refer the parties to appropriate resources, if necessary.

In the event that an agreement is reached that a mediator knows or has reason to believe (1) is contrary to the requirements of law, (2) is grossly inequitable to one or more parties, (3) is the result of false information, (4) is the result of bargaining in bad faith, (5) is impossible to enforce, (6) appears as if it is unlikely to hold over time, the mediator may pursue any or all of the following alternatives:

- A. Inform the parties of the difficulties that the mediator sees in the agreement;
- B. Inform the parties of the difficulties and suggest that the parties seek alternatives that might remedy the problem;
- C. Withdraw as mediator and disclose to both parties the particular reasons for such action.
A mediator may agree to mediate only when prepared to commit the attention essential to an effective mediation.

Mediators shall only accept cases when they can satisfy the reasonable expectations of the parties or order of the Court concerning the timing of the process. A mediator shall not allow a mediation to be unduly delayed by the parties or their representatives.

X. CONCLUDING MEDIATION

A mediator should encourage the parties to reduce all agreements to writing.

A. With Agreement

1. Full Agreement

A mediator shall discuss with the participants the process for formalization and implementation of the memorandum of understanding or agreement.

2. Partial Agreement

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

B. Without Agreement

1. Termination by Participants

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

2. Termination by Mediator

If a mediator believes that participants are unable or unwilling to meaningfully participate in the process, or that reasonable agreement is unlikely, a mediator may postpone a mediation session and/or withdraw from the mediation process and/or refer the parties to appropriate resources, if necessary.

3. 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.

XI. TRAINING AND EDUCATION

A. Training

A mediator shall acquire substantive knowledge and procedural skill in basic mediation theory and in any specialized area of practice in accordance with MtMA's Certified Mediator Qualifications and Family Certified Mediator Qualifications.

B. Continuing Education

A mediator shall participate in continuing education and be personally responsible for ongoing professional growth in accordance with MtMA's Certified Mediator Qualifications and Family Certified Mediator Qualifications. A mediator is encouraged to join with other mediators and members of related professions to promote mutual professional development.

XII. EXPERTISE

Mediators should perform their services only in those areas of mediation in which they are qualified either by experience or by training. Mediators should not attempt to mediate in an unfamiliar field or when there is risk of psychological, financial, legal or physical damage to one of the parties due to the mediator's lack of experience.

XIII. ADVERTISING AND SOLICITATION

Advertising or any other communication with the public concerning services offered or regarding the education, training, and expertise of a MtMA Certified Mediator (CM) shall be truthful. A mediator shall make only accurate statements about the mediation process, its costs and benefits. Mediators shall refrain from promises and guarantees of results regarding a mediation process. Only mediators who have earned MtMA's Certified Mediator designation (CM) in accordance with MtMA's Certified Mediator

Qualifications and Family Certified Mediator Qualifications and ascribe and comply with MtMA's Code of Ethics and Standards of Practice may use the CM designation and advertise their conformance thereto and compliance therewith.

XIV. PROFESSIONAL RELATIONSHIPS

A. The Responsibility of a Mediator Toward Other Mediators

1. Relationship with Other Mediators

A mediator should not mediate any dispute which is being mediated by another mediator without first endeavoring to consult with the person or persons conducting such mediation.

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 others informed of developments essential to a cooperative effort.

B. Relationship with Other Professionals

A mediator should respect the complementary relationship between mediation and legal, mental health, and other social services and should promote cooperation with other professionals.

XV. ADVANCEMENT OF MEDIATION

A. Mediation Service

A mediator is encouraged to provide some mediation service in the community for a nominal or no fee and to act as a mentor for others who are entering the profession.

B. 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 and to make mediation accessible to those who would like to use it; to correct abuses; to improve their own professional skills and abilities.

XVI. COMPLAINT/GRIEVANCE PROCEDURE

A. Receipt of Complaint or Grievance

Upon receipt of a signed complaint or grievance (used interchangeably hereinafter) against a Montana Mediation Association (MtMA) Mediator, the Chair of the Ethics Committee shall open a case file, acknowledge receipt of the complaint, and notify the Mediator of the complaint and invite a written response. Every effort shall be made to complete any grievance procedure within ninety (90) days from the time of the receipt of a signed complaint.

B. Initial Case Review

The Chair of the Ethics Committee, (Chair) may appoint a Case Manager to review the case or the Chair may assume that role. The review shall be to determine if additional information is necessary

and/or if there has been an apparent violation of MtMA mediation standards of practice. Any necessary additional information may be requested by the Case Manager.

C. Preliminary Determination of Violation

The Case Manager shall report in writing to the Ethics Committee the determination whether a violation of the standards of practice appears to have occurred. If no violation appears to have occurred, then both the Complainant and the Mediator shall be notified in writing with a brief explanation of the reasoning of the Case Manager. Thereafter, the case shall be dismissed and the case file shall be closed. If it appears a violation may have occurred, the Case Manager shall convene a Grievance Panel.

D. Grievance Panel

The Grievance Panel shall consist of the Case Manager and two MtMA Mediators. The Ethics Chair will prepare a list of candidates for the Grievance Panel. The Board of Directors will select the members of the grievance panel. Said panel shall review the case, request additional information, if necessary, and determine whether the Complainant and the Mediator desire to engage in informal conciliation or wish to proceed to an informal hearing. If either participant desires, an informal conciliation shall be facilitated by one or more members of the Grievance Panel, either face-to-face or via telephone. If both participants desire, the exchange of additional information shall be facilitated by one or more members of the Grievance Panel. If either participant does not agree on conciliation and/or information gathering, the Grievance Panel shall schedule an informal hearing. The participants shall present their respective facts and points of view and the panel of three shall by majority vote decide the matter.

E. Agreements and Decisions

Any agreements reached by the participants or decisions reached by the Grievance Panel shall be transmitted in writing to all participants, the Chair of the Ethics Committee, and the Board of Directors of MtMA. Agreements and decisions may include any of the following elements:

- a) Dismissal of the complaint; or
- b) Informal reprimand of the Mediator, which shall include a statement of the misconduct on the part of the Mediator, an agreement to correct the mediator's inappropriate behavior, and a statement of any penalty agreed to or imposed; or
- c) Formal reprimand of the Mediator, which shall include a complete statement of the factual basis for the determination of a violation or violations, and a statement of any penalty agreed to or imposed.

F. Penalties

Penalties may include but are not limited to:

- a) Free mediation session(s) by the Mediator with the Complainant, if appropriate; or
- b) Refund of all or part of the Mediator's fee; or
- c) Additional work to be performed by the Mediator: or
- d) Mandated supervised mediation or co-mediation; or

- e) Additional training for the Mediator; or
- f) Suspension or expulsion of the Mediator from MtMA membership.

G. Appeals

The decision of a grievance panel may be appealed to the MtMA Board of Directors within thirty (30) days of issuance of the written decision. The Board shall review the case and either render a final decision or appoint a new Grievance Panel. Decisions made upon appeal by a Grievance Panel are final.

H. Reinstatement

A former member of MtMA who has been suspended or expelled or a former Mediator whose membership has been revoked may reapply for membership no sooner than one (1) year from the date of suspension or expulsion.

I. Notice of Penalties

Notice of penalties assessed under 6 above and a brief statement of facts may be published in the next MtMA newsletter following final disposition of the complaint. The disclosure of the name of the mediator, for any purpose including the notice, will be at the discretion of the Board of Directors.

J. Retention of Records

The initial complaint, any written response, any written reports, decisions of the Case Manager or Grievance Panel, and any written agreements or penalties shall be retained in MtMA's official records. The MtMA President, Secretary, Chair of the Ethics Committee, Case Manager, Panel, and the Mediator involved shall have access to the file.

Adopted by Consensus 12/14/98 by the Board of Directors of the Montana Mediation Association.
4th Rev. 2/13/2014