

# **MONTANA MEDIATION ASSOCIATION**

## **STANDARDS OF PRACTICE**

### **QUALIFICATIONS FOR DESIGNATION OF FAMILY MEDIATOR**

These are the requirements for a Family Mediator in the Montana Mediation Association.

#### **(1) Education and Experience**

Before an individual begins training for Family Mediation, that person shall meet the following threshold qualifications:

- A. Hold a degree from a four-year undergraduate program, and
- B. Have at least five years experience in a human services field.

The Montana Mediation Association requires that a person specializing and practicing in Family Mediation have five years experience working with people. Examples of qualifying experience would include five years as: an attorney in family law; a counselor working with families; a minister with experience including pastoral counseling; a worker in a labor/management position, or a labor or union representative. In contrast, a family law attorney who worked exclusively on appellate court briefs would not meet the experience requirement.

After training, Experience consists of the following:

Co-mediation, at least 8 hours in 4 family cases. If co-mediation is not available, there must be at least 5 hours consultation or debriefing with a full member mediator approved by the MtMA Qualifications Committee, or 5 hours of supervised mediations.

#### **(2) Family Mediator Training and Skills**

Training for Family Mediators will consist of the following:

A. Completion of the training requirements for a Montana Mediation Association Full Member Mediator, plus two days (16 hours) of mediation training geared to Family Mediation, including but not limited to, training in interpersonal conflict, gender issues, communication processes, and ethics relevant to conflict involving a child;

OR:

Completion of five days (40 hours) Family Mediation training, including but not limited to, general mediation training and the subject areas mentioned above;

AND:

B. Two days (16 hours) training in child development family dynamics, and psychopathology, or their equivalents; and

C. Two days (16 hours) training in Family Law, including but not limited to financial, property, and custody/parenting issues, or their equivalents.

**(3) Continuing Education**

Continuing education of 16 hours per year, with one year carry-over provisions, in family mediation-related issues, four hours of which shall include child development, family dynamics, psychopathology, drug and alcohol abuse, and/or sexual abuse and domestic violence issues.

**(4) MtMA Ethical Standards**

The Family Mediation practitioner shall adhere to the Ethical Guidelines for Family Mediators in Montana.

2/22/99

# **MONTANA MEDIATION ASSOCIATION STANDARDS OF PRACTICE**

## **ETHICAL GUIDELINES FOR FAMILY MEDIATORS IN MONTANA**

### **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 (or 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. A mediator 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.

These ethical guidelines are intended to perform three major functions: to serve as a guide for the conduct of mediators; to inform the mediating parties; and to promote public confidence in mediation as a process for resolving disputes. These ethical guidelines 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 family and facilitative mediators. Specifically excepted from these Guidelines 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, 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:

- (1) mediation is private (Unless otherwise agreed by the participants, only the mediator, the parties and their representatives are allowed to attend);
- (2) 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);
- (3) mediation is confidential to the extent provided by law;
- (4) 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 any one 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 any one 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 contingent fees 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.

### **B. Responsibility to Third Parties**

A 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 the Guidelines for Mediator Qualifications.

### **B. Continuing Education**

A mediator shall participate in continuing education and be personally responsible for ongoing professional growth in accordance with the Guidelines for 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 the mediator 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 ascribe to and comply with the Family Mediator Qualifications and/or General Mediator Qualifications and this Code of Ethics shall 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 with out 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.

Adopted by consensus 12/14/98 by the Board of Directors of the Montana Mediation Association.  
Reformatted 5/1/99