

STANDARDS

In 1984, MCFM was the first state-wide organization to adopt standards of practice for mediators. Since then the standards have been amended twice—in 1987 and 1997. ALL mediators listed in the MCM Referral Directory annually agree to abide by these standards.

MCFM's STANDARDS OF PRACTICE

The definition of Family Mediation adopted by the Massachusetts Council on Family Mediation continues to be the basis for these Standards. The definition is as follows:

FAMILY MEDIATION offers a voluntary, non-adversarial, dispute resolution option to couples and families who are in the process of restructuring their lives. The parties are helped to reach a self-determined and reasonable agreement by a trained, neutral, third party: a mediator. The structured process is based upon a profound respect for the parties' autonomy and their ability to reach a fair and workable agreement.

1. DISPUTE RESOLUTION OPTION - implications:

* Mediation is distinguishable from other options.

* Mediation process is confidential.

A. It is important that the parties understand that mediation is different from other options: Litigation, arbitration, negotiation through lawyers, or therapy.

B. Before proceeding the mediator shall obtain sufficient information from the family so that the scope of the mediation and the issues to be discussed can be identified.

C. The mediator shall disclose, at the onset, the probable cost associated with mediation (hourly rate, estimated number of hours, other mediation associated costs) and should mention other possible costs outside the mediation. Fee structures should be such that unexpended portions of any retainer, or advance payments, can be returned to the parties. It is inappropriate for a mediator to set fees on a contingency basis.

D. Prior to the mediation the mediator shall inform the parties that all communications made in the presence of the mediator, all work products prepared by the mediator, and all case files of the mediator shall be confidential and not subject to disclosure by the mediator in any legal proceeding. To assure the confidentiality of the process, the mediator must enter into a written agreement with the parties. The mediator must also acknowledge circumstances under which he/she would report or be required to report specific facts to a third party.

2. VOLUNTARY - implications:

- * Parties have the right to withdraw from mediation.
- * Mediator has the right to withdraw from the process.

A. Prior to the mediation, the mediator shall inform the parties that any participant in the mediation has the right to withdraw from mediation at any time and for any reason, thereby terminating the mediation.

B. Prior to mediation, the mediator shall make clear the conditions under which he/she will terminate his/her involvement with the mediation.

C. The mediator shall make every effort to ensure that neither party uses the mediation process to unilaterally gain advantage through entering into mediation or, once having begun mediation, by withdrawing from mediation.

D. The mediator shall, upon request, return to the appropriate party any documents that have been submitted as part of the mediation process.

3. NON-ADVERSARIAL - implications:

- * No right/wrong or implication of guilt/innocence.
- * Need for complete and shared data: full disclosure.

A. The mediator has an obligation to make sure that the parties understand that the mediation process will not determine guilt or innocence, right or wrong, fault or blame.

B. The mediator shall make every effort to ensure that there is full and fair financial disclosure and that the development of all relevant factual information is totally acceptable to both parties.

C. The mediator shall make every effort to ensure that both parties have sufficient understanding of relevant statutory and case law (as well as local judicial tradition) to reach an informed agreement.

4. SELF-DETERMINED AGREEMENT - implications:

- * Power to reach agreement rests with both parties.
- * Potential need for outside counsel or other expert help.

A. The mediator has a responsibility to the parties to help them reach an informed agreement.

B. The mediator shall structure and conduct the mediation in a manner which allows each party an equal chance to express individual needs and interest, and to acquire the information and advice needed to reach an informed agreement. If the mediator is unable to achieve this balance, he/she should consider terminating the mediation.

C. The mediator shall encourage the parties to seek professional advice: legal, financial, therapeutic, or marriage counseling. The mediator may give general information that will help the parties make their decision, but shall not recommend specific courses of action regardless of professional background.

D. If one party lacks the ability to acquire (see 5 B) and understand the information involved in the substance of the mediation sufficiently to represent his/her own interests, the mediator should consider terminating or changing the scope of the mediation so that it is consistent with that party's ability to negotiate.

E. If one party is so emotionally distraught or mentally impaired as to be unable to adequately express short or long term interests, or to understand the choices with which he/she is confronted, the mediator should consider terminating or limiting the scope of the mediation so that it is consistent with the party's ability to negotiate.

5. REASONABLE - implications:

* Requires that the preceding and the following considerations have been observed.

* That the parties have designed an agreement with which they both can live, even if the mediator could not do so.

A. The mediator has a responsibility to ensure that the entire mediation process proceeds in a manner which maximizes the parties' ability to reach a fair and reasonable agreement.

B. If the mediator believes that either party is unable or unwilling to participate in a meaningful manner in the process, so that a reasonable agreement appears unlikely, he/she should either terminate the mediation and encourage the parties to seek appropriate professional help or suspend mediation until the imbalance can be rectified.

C. The mediator has an obligation to take exception with or disassociate himself/herself from an agreement that is, in the mediator's opinion, illegal or immoral by either:

(1.) informing the parties of the difficulty and suggesting a process to remedy the problem; or

(2.) withdrawing and disclosing the reason(s) to the parties for such withdrawal.

6. THE MEDIATOR SHALL BE IMPARTIAL (Adopted 11/10/97)

A. Principles:

These principles shall apply to all Applications.

I. A mediator shall act impartially throughout the mediation process. This means freedom from favoritism or bias toward any party.

II. It is fully consistent with the mediator's impartial role to: (a) help participants fully consider the best interests of the children, and the consequences for the children of any proposed agreement or process; and (b) provide relevant information even if such information may appear to favor a view point of one party.

III. No mediator shall act in any case in which s/he has an actual or potential conflict of interest significant enough to cast doubt on the integrity and impartiality of the mediator or the dispute resolution process. The mediator shall actively avoid any actions that might appear to create a significant conflict of interest.

IV. A mediator has a continuing duty throughout the mediation process to disclose to all parties participating in the mediation all actual or potential conflicts of interest, including circumstances that could give rise to an appearance of a conflict of interest.

V. In any situation where a mediator is unable to maintain impartiality, s/he shall inform the parties and decline to mediate or immediately withdraw from the mediation even if both parties wish to proceed. Whenever a mediator cannot be impartial, s/he shall offer referrals to other mediators or to the MCFM Referral List.

B. Applications

1. Prior and present relationships

a. Without exception during the mediation process, no mediator shall represent or provide therapy, financial or other professional services to either or both parties or serve as a Guardian Ad Litem during the mediation process.

b. In assessing whether a significant conflict of interest exists, a mediator shall examine any prior and/or present personal or professional contacts with all parties in order to answer the following questions:

i. Do I have actual knowledge of confidential information about a party such that even disclosure to the other party would not remedy an actual or perceived impairment of impartiality?

ii. Do I or have I had a personal, professional, or social relationship with any party such that even disclosure would not remedy an actual or perceived impairment of impartiality?

iii. Does a party have decision-making power over any significant aspect of my work, my future employment

or my income? For example, does a client have a large account with another member of my firm, such that the profits from that work will significantly affect my income?

iv. Do I have access to (but no actual knowledge of) confidential information about any party? For example, does my firm or partnership have confidential or privileged information about any party?

If the answer to questions i., ii., or iii. is "yes," then the mediator must decline and/or withdraw and provide appropriate referrals, even if the parties wish to proceed.

If the answer to question iv. is "yes," then the mediator shall decline to proceed with the mediation unless all parties agree to sign a written waiver of confidentiality authorizing disclosure to all parties and the mediator.

In every case, when any prior or current contacts are not deemed by the mediator to constitute a significant conflict of interest in any other way, these contacts must be fully disclosed to both parties and their consent obtained before the mediation can proceed.

2. Future relationships

After a mediation has effectively ended, whatever the outcome:

a. A mediator shall never represent or act on behalf of one party to the mediation against any other party to the mediation in any matter whatsoever, or act as a guardian ad litem in a dispute between the parties. With the consent of the parties, the mediator may act for them as an arbitrator or case evaluator. This paragraph applies to other individuals with whom the mediator is in business, such as other lawyers in a firm, or other mental health professionals in a group practice.

b. A mediator shall not solicit future business from any party to the mediation individually in any matter whatsoever, unless two years have elapsed since the mediation has effectively ended. Publication and distribution of informational materials which contain general descriptions of services offered, and are not targeted to a particular client, is permitted at any time.

c. Upon request by one party, a mediator may represent or act on behalf of one party individually provided the mediator discloses the potential loss of his/her impartiality for future mediations and either: (1) both parties knowingly consent; or (2) at least two years have elapsed since the mediation has effectively ended.

d. Upon request by both parties a mediator, in some other role, may represent or act on behalf of both parties provided the mediator disclosed the potential loss of his/her impartiality for future mediations.

7. THE MEDIATOR SHALL BE TRAINED - implications:

* The mediator shall have training and familiarity with mediation, conflict resolution, and negotiation techniques.

* The mediator shall have a knowledge base in the areas of family law, family dynamics, and the psychological aspects of the divorce process.

A. Mediators have a responsibility to become trained and to constantly upgrade their skills and theoretical grounding on an ongoing basis.

B. The mediator shall, if requested, provide prospective clients with a summary of his/her formal and experiential mediation training so that the parties can choose a mediator who most closely meets their requirements.