

**ACT Community Services and Health
Industry Training Advisory Board**

**ACT Competency
Standards for
Mediators**

December 1995

These Competency Standards for Mediators have been developed by the ACT Community Services and Health Industry Training Advisory Board with the assistance of a grant from the ACT Attorney General's Department.

ACT Mediation Competency Standards

Purpose

These competency standards have been developed by the mediation industry through the ACT Community Services and Health Industry Training Advisory Board.

The competencies are to inform trainers, employers, workers and private practitioners about agreed standards in mediation and to guide the development of legislative, statutory or regulatory standards applying to mediation practice in the ACT.

While these competency standards relate to mediation practice within the ACT, they are also intended to facilitate the development of national mediation competency standards.

The intention of this document is to set standards for mediation.

Mediation is a means of resolving disputes. It bears some resemblance to other dispute resolution methods, as well as some important differences. Some of the standards in this document may be relevant to other dispute resolution approaches.

These standards have been developed through the ACT Community Services and Health Industry Training Advisory Board. However, mediation is not regarded as belonging solely to Community Services and Health. Dispute resolution is practiced in a wide range of fields including law, business, construction, planning and public policy, education and training, human rights, industrial relations, international relations, management, community development, social work and psychology.

Therefore, while the mediation competency standards are located within the Community Services and Health Industry, they are intended for use across industries.

Competency

Competency comprises the specification of the knowledge and skill, and the application of that knowledge and skill to the standard of performance required in employment. The concept of competency includes all aspects of performance. It includes

- performance at an acceptable level of skill
- organising tasks
- responding and reacting appropriately when things go wrong
- fulfilling a role
- transfer of skills and knowledge to new situations

Definitions

For the purposes of these standards, the following definitions of mediation and of the role of a mediator have been adopted. The adoption of these definitions is to provide a common starting point and is not intended to pre-empt further discussion and refinement of these definitions.

For these standards mediation is defined as

*a process by which the participants, together with the assistance of a neutral person or persons, systematically isolate dispute issues in order to develop options, consider alternatives, and reach a consensual settlement that will accommodate their needs. Mediation is a process which emphasises the participants' own responsibility for making decisions that affect their lives. It is therefore a self-empowering process. (J Folberg and A Taylor, *Mediation: A Comprehensive Guide to Resolving Conflicts without Litigation* 1984).*

C. Moore, in *The Mediation Process*, (Jossey Bass 1989) describes a mediator as a person who intervenes in a dispute or negotiation as an acceptable, impartial, neutral third party who has no authoritative decision-making power to assist contending parties to voluntarily reach their own mutually acceptable settlement of issues in dispute.

Application Of Standards

These standards are intended to cover mediators specifically employed or engaged to conduct structured mediation to assist parties in resolving disputes. This may include practitioners employed on a full time or part time basis, retained on a sessional basis, or contracted by the parties to provide mediation.

The standards are not intended to cover the informal use of mediation techniques or strategies used by practitioners engaged in a role other than mediation.

These standards define the core competencies required of mediators in a wide range of settings and contexts.

While mediators may be drawn from many different sources, the core requirements to effectively conduct a mediation are the same. The standards therefore do not propose different levels or categories for mediators. However, different agencies may adopt additional specialist requirements which they regard as necessary to effectively carry out mediation in their particular field.

The standards relate to the actual conduct of mediation sessions. They do not relate to pre-mediation intake functions such as initial contact with the parties and scheduling of sessions, nor to post-mediation follow up. Such functions may be carried out by mediators themselves or by other specially trained personnel, but are not part of the core competencies for all mediators.

Range of Variables for all Units in ACT Mediation Competency Standards

Competencies apply to mediators working alone or in an agency setting.

These competencies relate to mediation involving small numbers of people and do not include dealing with highly specialised, very complex, multi-party or highly technical issues.

Agency guidelines apply in all mediation. Agency guidelines include agency specific guidelines, relevant professional association standards, and private practitioner guidelines.

The competencies apply to mediation practised by sole mediators, co-mediators or by a panel of three or more mediators.

Competencies apply across the range of cultures and social groups in the Australian community.

Mediation contexts may include mediation involving parties with a range of social and personal characteristics. These may include language, religious beliefs, forms of address, family relationships, social organisation, gender, sexual preference, abilities and disabilities, age, race, culture or ethnic background.

Mediators do not engage in advice giving, arbitration, counselling, advocacy, or therapeutic counselling during mediation.

Work involves use of a variety of equipment in a manner which caters to needs of the parties.

Language includes oral, written, non verbal, and the use of interpreters.

Safety procedures are used which are subject to agency and/or industry guidelines and within requirements established by international, Commonwealth and State legislation and relevant program standards.

If a party no longer wishes to continue, mediation is terminated.

Mediators may terminate mediation if agency requirements and conditions for mediation no longer apply.

Confidentiality is maintained by the mediators at all times during and after mediation, subject to statutory obligations.

Evidence Guide for all Units in ACT Mediation Competency Standards

Evidence may be sought that

- competence is demonstrated by performance in two contexts: knowledge and use of process
- competence is demonstrated on and off-the-job through direct observation of real or simulated performance
- mediation is congruent with agreed definitions of mediation
- the mediator uses professional judgement to apply the process in a flexible manner that maintains the integrity and transparency of the process
- full consultation with any co-mediator is used at all times throughout the mediation
- mediators have underpinning knowledge of
 - relevant current legislation, agency guidelines and ethical guidelines
 - cultural factors relevant to the mediator's area of responsibility
 - use of interpreters in a wide range of mediation situations.

Observations of performance should be used to assess the following interventions:

1. *Neutral and impartial process facilitation*

Assessors may seek evidence that mediators

- provide time and attention for all parties which includes adequate consideration of parties' needs.
- check physical comfort of parties periodically
- arrange breaks during session, as needed
- note social or personal characteristics which may impact on the mediation
- choose approaches which result from assessment of cultural, social or other individual differences
- ensure that parties determine content of discussions throughout mediation
- consider individual values which have an impact on communication and relationships.

2. *Promotion of communication and co-operation between parties*

Assessors may seek evidence that mediators

- use equipment in a manner that caters to the individual needs of parties
- paraphrase, ask clarifying questions and summarise to assist parties to feel heard
- use a range of rapport-building strategies, such as adapting terms used, pace or volume of speech to suit the language level of the parties and mirroring non-verbal behaviour
- guide communication flow directly between parties, from agenda setting stage until close of mediation, excluding any private session
- use minimally obtrusive verbal and non-verbal behaviours to manage interruptions
- remind parties about agreed ground rules if other interventions are ineffective
- raise questions between parties about feelings and specific behaviours to encourage constructive expression of emotions and prevent escalation of conflict
- encourage parties to describe their understanding of others' statements about feelings, needs and ideas
- use fact finding questions to meet parties' needs

- model teamwork when co-mediating by
 - openly observing progress of mediation and relevance of discussion to agenda topic/s and checking about any proposed action
 - openly consulting with co-mediator
 - referring to co-mediator's statement or questions
 - maintaining non-verbal contact with any parties not directly communicating with another party or mediator(s).

3. *Paraphrasing and summarising*

Assessors may seek evidence that mediators

- listen effectively to stated or indicated feelings
- show sensitivity to scope and intensity of issues
- focus on agenda items
- reflect the stage of the mediation process
- acknowledge the need to build rather than impose options
- indicate common ground between parties
- use silence and other non-verbal communication as appropriate strategies
- maintain balanced communication which flows directly between parties
- clarify between parties the effects of past events relating to dispute issues
- elicit from parties paraphrased summaries of others' expressed thoughts, feelings or ideas on agenda items.

4. *Consistent application of agreed mediation process*

Assessors may seek evidence that mediators

- apply stages sequentially
- use communication flow appropriate to stage of mediation
- explain movements between stages and any variation to the process
- focus specifically on past, then present and future while facilitating exploration of each agenda issue
- refer to agenda to guide movement through and adaptation of process
- manage contingencies in keeping with process requirements and agency guidelines
- act as an agent of responsibility and reality for the parties
- shuttle negotiation is used where appropriate.

5. *Termination of session*

Assessors may seek evidence that mediators

- check with co-mediator about terminating
- discuss openly with parties, with respect for confidentiality of any private session or other non-mediation disclosures
- assert any need for termination in line with agency guidelines.

UNIT 1 PLAN AND PREPARE MEDIATION

Description: This unit describes the functions involved in preparing to conduct a mediation.

Elements	Performance Criteria
1.1 Prepare approach to mediation	<ul style="list-style-type: none">1.1.1 All relevant briefing documents are accessed and judgments made regarding the use of these1.1.2 Social, or personal characteristics which may have an impact on the mediation are assessed and reflected in the approach chosen1.1.3 Assessment is made on the relevance and limitations of the mediation process to the dispute and / or the requirement for pre-mediation caucus1.1.4 Adequacy of intake procedures is confirmed
1.2 Implement any co-mediation processes	<ul style="list-style-type: none">1.2.1 Co-mediation needs are identified and co-mediation is implemented according to agency guidelines1.2.2 Co-mediation roles are clarified and used according to agency guidelines1.2.3 Teamwork, and respectful cooperation are used to support co-mediator and apply process of mediation1.2.4 Full consultation with any co-mediator is used
1.3 Prepare venue and resources	<ul style="list-style-type: none">1.3.1 Needs of parties are analysed and venue is prepared accordingly1.3.2 Observers and other participants are included according to agency guidelines1.3.3 Language is selected and used to accommodate specific needs of the parties1.3.4 Interpreters are used effectively and according to agency guidelines to best promote understanding between all parties and mediators1.3.5 Equipment, tools and any other resources required are organised to support mediation process when needed
1.4 Provide for party and mediator safety needs	<ul style="list-style-type: none">1.4.1 Court orders are noted, potential risks are identified, and responses formulated using relevant knowledge of safety procedures1.4.2 Strategies for safety of all parties and mediators are planned and used1.4.3 Security and safety guidelines are used in accordance with legislative and industry procedures

Range of Variables

The Range of Variables for all Units applies in this unit

Evidence Guide

Evidence listed in *The Evidence Guide for all Units* must be provided along with the following evidence specific to this unit, *Plan and Prepare Mediation*.

Observations of performance may seek evidence that

- parties are placed in separate waiting areas, as warranted and as indicated by agency guidelines
- room layout and seating arrangements are suited to nature of dispute and number of people present
- relevance and limitations of mediation process to the dispute are both identified
- any interpreter briefing emphasises need to promote understanding rather than inhibit or reinterpret expression of feeling, thoughts and ideas during translation
- agency guidelines and program standards specific to any criteria are identified

UNIT 2 ESTABLISH CLIMATE FOR MEDIATION

Description: This unit describes the functions related to the introductory phases of the mediation process, which establishes atmosphere to maintain neutral, impartial, non-judgemental relationship with parties.

Elements	Performance Criteria
2.1	Create atmosphere for mediation
2.1.1	Parties are welcomed in a respectful manner taking into account their particular needs
2.1.2	Physical and communication needs of parties are assessed, checked with them and suitable arrangements made
2.1.3	Parties are given time and attention that includes adequate consideration of needs
2.1.4	A variety of strategies is used to create rapport between all parties and mediators
2.1.5	Communication flow is kept between mediators and parties
2.2	Clarify roles and process
2.2.1	Parties are clear on own, mediator, and agency role,
2.2.2	Boundaries of confidentiality and privacy are clear to parties
2.2.3	Expectations and objectives of the mediation are clear and agreed
2.2.4	Ground rules are established and commitment to them is obtained
2.2.5	Parties understanding of the sequential steps of mediation is verified.
2.2.6	Parties consent to being held to the process
2.2.7	Parties accept mediators as neutral and impartial process facilitators

Range of Variables

The Range of Variables for all Units applies in this unit

Evidence Guide

Evidence listed in *The Evidence Guide for all Units* must be provided along with the following evidence specific to this unit, *Establish Climate for Mediation*.

Observations of performance may seek evidence that

- reasons for any pre-mediation private session are outlined
- role of any observer is explained and party agreement checked
- agency guidelines and program standards specific to any criteria are identified
- time frame for mediation is discussed and agreed with parties
- parties' agreement to presence of any support people is checked.

Description of process sequence and communication flow includes but is not limited to

- parties observe ground rules, and use mediation process under mediator guidance
- parties, in turn, express concerns to mediator(s) without interruption
- mediator(s) summarise and check with parties, in turn, the facts and feelings in statements of their concerns
- parties communicate directly with each other about agenda items to explore thoughts, feelings and ideas and consider approaches to resolving issues
- private session with mediator(s) is arranged for parties, in turn, as needed
- progress of mediation is checked and any obstacles to continuing are clarified with parties
- parties and mediators jointly identify acceptable wording when creating any written statement of outcomes
- mediators summarise outcomes, clarify option for future negotiations between parties and close mediation session.

Ground rules are outlined and include that

- parties be allowed to speak without interruption
- any observer or interpreter observes agreed role
- privacy and confidentiality commitments are identified
- parties will be encouraged to express own issues, needs and feelings and to avoid any personal attacks.

Mediator is able to outline, in principle, any legislation relevant to agency role.

UNIT 3 CREATE A FRAMEWORK FOR DISCUSSION

Description: This unit describes the functions required to manage information exchange in order to identify, isolate and clarify issues.

Element	Performance Criteria
3.1 Identify issues	<ul style="list-style-type: none">3.1.1 Information is gathered effectively, allowing parties to adequately express facts and feelings3.1.2 Parties freely express their needs, concerns and mutual expectations3.1.3 Parties are encouraged to listen to each other respectfully and without interrupting3.1.4 Time frames are managed to allow full identification of issues3.1.5 Opportunities exist to acknowledge absent parties relevant to the dispute
3.2 Develop an agenda in consultation with parties	<ul style="list-style-type: none">3.2.1 Parties' concerns and priorities are encapsulated in the agenda without bias towards any party.3.2.2 Parties consent to agenda and its use3.2.3 Parties are clear that agenda is reviewed as necessary3.2.4 Starting point for party to party discussion is determined through consultation.

Range of Variables

The Range of Variables for all Units applies in this unit.

Evidence Guide

Evidence listed in *The Evidence Guide for all Units* must be provided along with the following evidence specific to this unit, *Create a Framework for Discussion*.

Observations of performance may seek evidence that

- paraphrasing and clarifying questions are used as needed to elicit a clear statement from parties of their concerns relevant to the dispute
- agenda recording is sensitively adapted to parties' language or literacy levels
- interruptions are minimised by respectfully asserting agreed guidelines
- statements accurately summarise and comprehensively reflect parties' expressed concerns, including any facts, opinions, feelings, thoughts and ideas
- any summaries are verified with parties
- reported speech is used to summarise statements objectively
- issues are reframed positively while still accurately representing party statements
- main agenda points are identified in consultations with parties and any co-mediator
- agenda represents common and separate issues between parties in a balanced way and provides scope for full discussion of identified concerns
- direction of communication flow is between parties and mediators.
- parties are moved through a process that
 - elicits from each of them a clear statement of their issues and concerns relevant to the dispute
 - enables them with the assistance of the mediators to identify the main points in dispute
 - documents the main points in an agenda which is then used to guide a full discussion among them.

UNIT 4 FACILITATE EXPLORATION OF ISSUES

Description: This unit describes the functions required to explore issues to develop options and ensure contributions to discussions are balanced between the parties.

Elements	Performance Criteria
4.1 Promote communication and understanding between parties	<ul style="list-style-type: none">4.1.1 Parties communicate directly with each other to their level of ability and willingness.4.1.2 Interaction between parties is balanced and adequate attention is given to needs of each party4.1.3 Parties' focus is shifted comfortably between past, present and future4.1.4 Opportunities are taken to allow parties to express concerns, facts, opinions and feelings and possible alternative behaviours4.1.5 Each party is afforded opportunities to exhibit an understanding of the other's needs, interests, perceptions, expectations and feelings about agenda items4.1.6 Atmosphere is established in which parties express a range of emotions including anger and tension constructively4.1.7 Opportunities are created to recognise and acknowledge progress made4.1.8 Agenda is modified in consultation with parties to include emerging issues
4.2 Use strategic interventions	<ul style="list-style-type: none">4.2.1 Interventions are used that are congruent with the industry agreed definitions of mediation4.2.2 Interventions are used to avoid polarisation4.2.3 Emotions, interactions and interruptions from parties are controlled in ways acceptable to the parties and the agency4.2.4 Strategies for involving absent parties are discussed as required
4.3 Encourage parties to explore options	<ul style="list-style-type: none">4.3.1 Parties fully explore the dimensions of each issue on the agenda4.3.2 Parties' need for and access to relevant information is clarified4.3.3 Workable, multiple options are generated by parties4.3.4 A variety of problem solving techniques are used by the parties4.3.5 Options are reviewed and evaluated by the parties
4.4 Use private session / caucus as required	<ul style="list-style-type: none">4.4.1 Appropriateness of private session is identified and negotiated with parties4.4.2 Private session is used effectively and according to agency guidelines

Range of Variables

The *Range of Variables for all Units* applies in this unit.

Evidence Guide

Evidence listed in *The Evidence Guide for all Units* must be provided along with the following evidence specific to this unit, *Facilitate Exploration of Issues*.

Observations of performance may seek evidence that mediators

- initially focus parties on the past and invite parties to respond to each other's perceptions of the past
- prompt parties to check and clarify with each other using problem solving strategies
- assist parties to check and clarify with each other any emerging values impacting on communication, behaviours or likely outcomes of session
- identify between parties any premature decision-making on issues
- have parties assess with each other the realities and responsibilities relating to the options which they might be proposing
- summarise any options discussed on each issue prior to any private session.

Emerging conflicts are checked with parties and incorporated into agenda. Effective management of emerging conflict includes

- incorporation into agenda and loop back
- assistance to parties to set priorities
- deferral or adjournment or termination.

Parties' need for additional information and expertise is determined in consultation with parties.

Any personal opinions of mediators are withheld from parties through assertion of process, even if sought.

Private session or caucus is used according to agency guidelines and mediator and party roles are maintained during any private session.

Parties not in private session are directed to private areas and amenities and are kept informed on process issues, if time frames indicate the need.

Need for further information is checked with each party during any private session.

Timing of information-giving or referral (in full mediations or in private session) is appropriate to sensitivity of issues and need for confidentiality.

Information may include but not be limited to legal publications or government releases, and pamphlets from such places as the

- child support agencies
- courts,
- rental bond boards.

Relevant publicly available information which promotes understanding of the dispute may be provided to parties in response to direct request or in response to implied need.

UNIT 5 PROMOTE NEGOTIATION

Description: This unit describes the functions involved in negotiation and problem solving.

Element	Performance Criteria
5.1	Facilitate negotiation between parties
5.1.1	Focus of parties shifts to future
5.1.2	Parties propose and jointly evaluate offers / ideas using agenda
5.1.3	Parties accept responsibility for their own decisions
5.1.4	Opportunities and time are provided for parties to think clearly and to discuss concrete proposals
5.1.5	Bargaining between parties is accepted as occurring in good faith
5.1.6	Parties negotiate and find their own constructive and realistic solutions
5.1.7	Mediations are adjourned or deferred when necessary to enable effective negotiation between parties
5.2	Promote problem solving
5.2.1	Opportunities are created for parties to use creative and realistic problem solving
5.2.2	Parties recognise and evaluate current and likely future needs
5.2.3	Potential conflicts are identified and action planned to resolve or avert them
5.2.4	Parties explore contingency plans with each other
5.2.5	Opportunities are provided for parties to discuss the financial and other costs of disagreement
5.2.6	Parties focus on the future to reach mutually agreed and satisfactory outcomes that accommodate their needs and interests

Range of Variables

The Range of Variables for all Units applies in this unit.

Evidence Guide

Evidence listed in *The Evidence Guide for all Units* must be provided along with the following evidence specific to this unit, *Promote Negotiation*.

Observations of performance may seek evidence that

- mediators keep confidential matters discussed during any private session
- the agenda is further used to promote negotiation between the parties in a way that enables them to reach outcomes that are mutually acceptable
- mediators create opportunities for parties to acknowledge own and each other's past actions, consider present needs and create future options by
 - paraphrasing relevant party's proposals to help parties clarify agreements
 - summarising overall comments and responses on each issues, identifying shifts in time focus as needed
 - reinforcing this process for each agenda issue
 - summarising options discussed on each issue prior to finalising agreement

UNIT 6 IDENTIFY AND ESTABLISH OUTCOMES

Description: This unit describes the functions involved in identifying and recording agreements and closing mediation.

Elements	Performance Criteria
6.1 Identify and record agreed outcome	
	6.1.1 Outcomes are positive in direction, prioritised and represent parties' feelings, needs and interests on resolved and unresolved issues
	6.1.2 Outcomes reflect shared responsibility and short/long term and contingency plans
	6.1.3 Viability and legality of outcomes are tested by parties
6.2 Close mediation	
	6.2.1 Outcomes are summarised and time frames, follow-up and further contact are negotiated and determined
	6.2.2 Parties are referred to alternative agencies / services where the needs are identified as beyond the scope of the services able to be provided
	6.2.3 Parties have confidence in mediator and mediation process
	6.2.4 Parties have a forum or process for future resolution
	6.2.5 Mediation is formally closed

Range of Variables

The Range of Variables for all Units applies in this unit.

Evidence Guide

Observations of performance may seek evidence that mediators have knowledge or ability to access knowledge of local resources

Mediation agreements or statements of outcomes

- are fair and balanced
- are positive in direction, attitude and wording
- are workable
- allocate responsibility for each future event
- are specific
- are checked off against the agenda
- contain a course of action for any future disagreement
- are what the parties want

Any statements of unresolved issues need to

- include offers made / reasons for non-acceptance
- clarify issues to be resolved
- indicate possible forum / process for future resolution
- communicate neutrality

UNIT 7 MAINTAIN PROFESSIONAL STANDARDS

Description: This unit describes the process of maintenance and review of professional standards.

Element	Performance Criteria
7.1 Operate within ethical guidelines	<ul style="list-style-type: none">7.1.1 Contact and relationship with parties complies with agency / industry / organisational policy7.1.2 Limits of the mediation process are established7.1.3 Mediation is terminated in accordance with ethical guidelines
7.2 Debrief / consult as required	<ul style="list-style-type: none">7.2.1 Self evaluation is undertaken in conjunction with supervisors and /or peers7.2.2 Open and evaluative feedback is given to co-mediator7.2.3 Feedback is actively sought and accepted non defensively7.2.4 Dynamics of dispute are analysed with a view to improving technique
7.3 Provide feedback and reports	<ul style="list-style-type: none">7.3.1 Feedback is recorded in the required format and the content is negotiated with co-mediator7.3.2 Records are updated and maintained
7.4 Review and evaluate mediation	<ul style="list-style-type: none">7.4.1 Mediation process and value of service to parties is reviewed7.4.2 Feasibility of outcomes is assessed7.4.3 Recommendations and proposals for follow up or action are referred to the appropriate people
7.5 Improve the quality of practice	<ul style="list-style-type: none">7.5.1 Specialist advice / further training is sought where the need is identified7.5.2 Agency guidelines are observed in relation to professional development7.5.3 Current industry practice is appraised and applied to improve mediation process7.5.4 Commitment to upgrading skills and knowledge is evident through regular participation in a review mechanism7.5.5 Current and likely future needs are evaluated and action taken to keep abreast of evolving trends in mediation

Range of Variables

The Range of Variables for all Units applies in this unit.

Agency guidelines are observed in relation to professional development.

Agency guidelines and legislation are followed with respect to reports of child abuse, suicide threats, and threats of violence.

Evidence Guide

Evidence listed in *The Evidence Guide for all Units* must be provided along with the following evidence specific to this unit, *Maintain Professional Standards*

Observations of performance may seek evidence that

- agency guidelines in relation to professional development are identified
- notes, documents or videos relating to the mediation are securely filed or destroyed, as required by agency guidelines
- agency guidelines are identified in relation to confidentiality, fees for service, favours, and relationships with parties.

Evidence of participation in the development of current industry practice may include involvement in publications, conferences, workshops and mediator audits.

ETHICAL STANDARDS FOR MEDIATORS

1. DEFINITION

Mediation is a process in which an impartial third party - a mediator - facilitates the resolution of a dispute by promoting uncoerced agreement by the parties to the dispute. A mediator facilitates communication, promotes understanding, assists the parties to identify their needs and interests, and uses creative problem solving techniques to enable the parties to reach their own agreement.

COMMENTS

- (a) *The mediator should provide information about the process, and help the parties identify their real concerns and all their options. The primary role of the mediator is to facilitate voluntary resolution of disputes by the parties themselves.*
- (b) *A mediator cannot personally ensure that each party has made a fully informed decision when reaching an agreement to resolve a dispute, but it is good practice for the mediator to make the parties aware of the importance of consulting other professionals, where appropriate, to help them make informed decisions.*

2. IMPARTIALITY

A mediator may mediate only those matters in which the mediator can remain impartial and even handed. If at any time the mediator is unable to conduct the process in an impartial manner the mediator must withdraw.

Accordingly, a mediator must avoid:

- (i) partiality or prejudice; and
- (ii) conduct that gives any appearance of partiality or prejudice.

COMMENT

- (a) *Whatever their own views and standards mediators should not only not be partial or prejudiced but should avoid the appearance of partiality or prejudice by reason of such matters as the parties' personal characteristics, background or conduct at the mediation.*
- (b) *Mediators should seek to avoid behaviour which, however innocent, may be interpreted as indicating partiality or prejudice, such as spending more time with one party than another without good reason, socialising with a party and adopting different modes of address.*
- (c) *Even if all the disputants agree that they would like the mediator to express an opinion on the merits, there is a substantial risk in giving such an opinion that the mediator may no longer appear to be impartial. As a result the mediator may be obliged to withdraw.*

3. CONFLICTS OF INTEREST

Before the mediation begins, the mediator must disclose all actual and potential conflicts of interest known to the mediator.

Disclosure must also be made if conflicts arise during the mediation.

After making disclosure the mediator may proceed with the mediation if all parties agree and the mediator is satisfied that the conflict will not preclude the proper discharge of the mediator's duties.

After the mediation a mediator must not act in such a manner as to raise legitimate questions about the integrity of the mediation process.

COMMENTS

- (a) *Conflicts of interest may arise in recommending the services of others. It may be preferable to recommend referral services or associations which maintain rosters of qualified persons.*
- (b) *External pressures should never influence the mediator. The mediator's commitment should be to the parties and the process.*
- (c) *Interests which should be disclosed include any association with a party or adviser or representative of a party, which could reasonably be seen to affect the impartiality of the mediator.*
- (d) *The mediator should disclose to the participants any circumstances which may cause, or have tendency to cause, a conflict of interest. In particular a mediator who is a partner or an associate of any representative retained by either of the parties should not act as mediator without the fully informed consent of all the parties.*
- (e) *The mediator should not establish a professional relationship with one of the parties in relation to the same dispute.*

4. COMPETENCE

A mediator must not mediate unless the mediator has the necessary competence to do so and to satisfy the reasonable expectations of the parties.

A person who agrees to act as a mediator holds out to the parties and the public that she or he has the competence to mediate effectively.

COMMENTS

- (a) *Competence comprises appropriate knowledge and skills which would normally be acquired through training, education, and experience.*
- (b) *Mediators should have available for the parties information regarding their training, education and experience.*

- (c) *When a person is appointed or nominated to a panel or list of mediators, the appointing court, tribunal, institution, or agency should ensure that the mediator has through training, education and experience acquired the necessary knowledge and skill for inclusion on the particular panel or list.*
- (d) *The qualifications for inclusion on a list of mediators should be made public and available to interested persons.*

5. CONFIDENTIALITY

Subject to the requirements of the law a mediator must maintain the confidentiality required by the parties.

COMMENTS

- (a) *As the parties' expectations regarding confidentiality are important, the mediator should discuss those expectations with the parties and endeavour to meet them.*
- (b) *The parties' expectations of confidentiality depend on the circumstances of the mediation and any agreements they, and any other persons present at the mediation, and the mediator may make.*
- (c) *A mediator should not disclose any matter that a party requires to be kept confidential (including information about how the parties acted in the mediation process, the merits of the case, or settlement offers) unless:*
 - (i) *the mediator is given permission to do so by all persons in attendance at the mediation with an interest in the preservation of the confidence; or*
 - (ii) *the mediator is required by law to do so.*
- (d) *The parties and the mediator may make rules with respect to confidentiality.*
- (e) *If the mediator intends to hold private sessions with a party, the mediator should before such sessions discuss with the parties the confidentiality attaching to them.*
- (f) *Any reporting which requires a subjective judgment by the mediator of the conduct of the parties is likely to destroy the integrity of the mediation process.*
- (g) *Under appropriate circumstances, researchers may be permitted to obtain access to statistical data.*
- (h) *With the permission of all of the parties, researchers may be permitted access to individual case files, to observe mediations, and to interview participants.*
- (i) *A mediator should render anonymous all identifying information. When materials emanating from a mediation are used for research, supervision, or training purposes, the mediator should remove all identifying information from them.*

6. QUALITY OF THE PROCESS

A mediator must prepare for and conduct the mediation diligently, and with due regard to the fact that an agreed outcome requires the uncoerced consent of the parties.

COMMENT

A mediator's conduct should not be influenced by a desire to achieve a high settlement rate.

If the mediator believes that further negotiations may, subject to the parties' right to terminate the mediation, lead to a settlement, he or she may encourage the parties to continue to negotiate even when they seem unable to agree.

7. TERMINATION OF MEDIATION

A mediator may terminate the mediation if the mediator considers that:

- (i) any party is abusing the process; or
- (ii) there is no reasonable prospect of settlement.

If the mediation results in a settlement between the parties, the mediator should encourage the parties to record those terms of settlement in writing.

COMMENT

Normally agreement to record the terms of any settlement should be made prior to the commencement of the mediation.

8. PUBLICITY AND ADVERTISING

A mediator must not engage in misleading or deceptive publicity or advertising.

A mediator must not make any false or misleading statement including statements or claims as to the mediation process, its costs and benefits, or the mediator's role, skills, or competence.

9. FEES

A mediator must fully disclose his or her fees to the parties.

COMMENT

As early as practicable, and before the mediation session begins, a mediator should obtain the agreement of the parties regarding all fees and other expenses to be charged for the mediation and by whom and when the fees and expenses are to be paid. The better practice is to record in writing the arrangements in respect of fees and costs. A mediator should not agree to a fee which is contingent upon the result of the mediation or amount of settlement.