

ETHICAL STANDARDS FOR MEDIATORS

The following statement is extracted from the Law Council of Australia's statement for the ethical practice of mediation and has been adopted by the LEADR board.

Introductory Note

The Law Council of Australia has developed these standards to serve as a general ethical and practical framework for the practice of mediation. The standards are intended to apply to all types of mediation. Particular professional and other bodies may have different requirements. It is expected that the standards will be reviewed from time to time.

The standards of conduct for mediators are intended to perform three major functions:

- to serve as a guide for the conduct of mediators;
- to inform the mediating parties;
- to promote public confidence in mediation as a process for resolving disputes.

The standards draw on existing codes of conduct for mediators and take into account issues and problems that have surfaced in mediation practice. They are offering in the hope that they will serve an educational function and provide assistance to individuals, organisations and institutions involved in mediation.

These standards are based on the work of three professional groups in the United States: the American Arbitration Association, the American Bar Association, and the Society of Professionals in Dispute Resolution. They were reworked for Australia in 1996 by members of the Alternative Dispute Resolution of the Law Council of Australia: (Alan Limbury, Laurence Boulle, Charles Brabazon QC, Carol Dance, Michael Klug, Henry Jolson QC, Ruth McColl S.C., Julian Riekert, Philip Theobald, Mary Walker).

The standards were further reviewed and updated by the Committee in February 2000: (Henry Jolson QC, Michael Hollingdale, Michael Klug, Alan Limbury, Joanne Staugas, Philip Theobald, Mary Walker).

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

- 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.*
- 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.

Comments

- (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.

8. RECORDING 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. The mediation ought to be cautious about direct involvement in drafting the terms of agreement, as their involvement in drafting may be construed as providing legal advice.

9. 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.

10. 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.