

ADR Association of Barbados Inc.

CODE OF CONDUCT FOR MEDIATORS

JUNE 2005

**ADR Association of Barbados Inc.
Code of Conduct for Mediators**

Preamble, Scope and Purpose:

This Code of Conduct for Mediators was prepared in February 2005 by the ADR Association of Barbados Inc. and applies to all mediators, certified and non-certified, and is inclusive of volunteers, paid by the parties, court annexed, and to all types of mediations.

This Code of Conduct for Mediators is intended to serve as fundamental ethical guidelines for persons mediating in all practice contexts, and furthermore serves three major objectives:

- (i) To guide mediators in the discharge of their professional responsibilities,**
- (ii) To inform the mediating parties, and**
- (iii) To promote public understanding and confidence in mediation as an alternative procedure for resolving disputes.**

The purpose of this initiative was to develop a set of standards to serve as a general framework for the practice of mediation. Persons serving as mediators are responsible for preserving the integrity and professionalism of the mediation procedure and for conducting themselves in a dignified manner that will merit the confidence of the parties, members of the Bar and the Bench and the public at large.

It is understood that in some cases the application of this Code of Conduct for Mediators may be affected by legislation or contractual agreements.

Definition of Mediation:

Mediation is a process in which an impartial (neutral) third party facilitates communication between the disputing parties with the objective of assisting them in reaching a self-determined and acceptable agreement. Mediators promote mutual understanding, focus the parties on their interests, their responsibility towards their families, their standing within their communities and assist the parties in developing options to make informed decisions that will promote settlement of their dispute.

Mediators do not have the authority to make decisions for the parties nor to impose a settlement.

Mediation serves various purposes, including:

- a. providing opportunities for parties to define and clarify issues,**
- b. understand different perspectives,**
- c. identify interests,**

**ADR Association of Barbados Inc.
Code of Conduct for Mediators**

- d. explore and assess possible resolutions, and**
- e. reach mutually satisfactory agreements.**

These Codes of Conduct for Mediators serve to enhance the definition of mediation.

Note on Construction:

This Code of Conduct for Mediators is to be read and construed in its entirety. There is no priority significance attached to the sequence in which the principles are set out.

The use of the term “shall” in a principle is the highest level of guidance, indicating that the mediator does not have discretion to depart from the practice described.

The use of the term “should” indicates that the practice described in this Code is highly desirable and is to be departed from only for compelling reasons and requires careful judgment and discretion.

The use of the term “mediator” is understood to be inclusive so that it applies to co-mediators.

These Codes of Conduct for Mediators do not include specific temporal parameters when referencing a mediation, and hence, do not define the exact commencement or termination of a mediation.

It is foreseen that certain aspects of mediation, including several matters covered by these Codes may also be affected by applicable law, court rules, regulations, other applicable professional rules, mediation rules to which the parties have agreed and other agreements of the parties. Where these sources may create conflicts with, and may take precedence over these Codes of Conduct, a mediator should seek to resolve such conflicts in accordance with these Codes.

I. Principle Of Self-Determination:

A mediator shall proceed with the understanding that mediation is based on the fundamental principle of self-determination by the parties. Self-determination is defined as the act of reaching at a voluntary, uncoerced resolution of their conflict in which each party makes free and informed choices in good faith to the mediation process and outcome. Parties may exercise self-determination at any stage of a mediation including mediator selection, process design, participation in or withdrawal from the process and outcomes. Any party may withdraw from mediation at any time. Although party self-determination for process design is a fundamental principle of mediation practice, a mediator may need to balance such party self-determination with a mediator's duty to conduct a quality process in accordance with these Standards.

Mediator's role:

- (i) A mediator shall assist the parties in reaching an informed settlement and voluntary agreement, centered on restoring harmony and preventing future conflicts between the parties involves.**
- (ii) A mediator shall not coerce or unduly influence a party into a settlement agreement either directly or indirectly, and shall not make substantive decisions for any party to the mediation process.**
- (iii) A mediator shall not intentionally or knowingly misrepresent material facts or circumstances in the course of conducting mediation.**
- (iv) A mediator shall promote a balanced process and shall encourage the parties to conduct the mediation deliberations in good faith and a non-adversarial manner.**
- (v) A mediator shall promote consideration of the interests of persons affected by actual or potential agreements who are not represented at the mediation table, inclusive of the disputants' network of family and other relationships with the ultimate aim of stabilizing and restoring harmony within the community.**
- (vi) A mediator shall promote mutual respect and understanding among the parties throughout the mediation process, while encouraging harmony and respect for the community at large.**

Comments:

While a mediator has no duty to specifically advise a party on legal matters and issues, or on the implications or consequences of their proposed agreement, there is a duty for the mediator to advise the parties of the importance of understanding such matters and providing them with the opportunity to seek such advise if they desire. A mediator cannot personally ensure that each party has made a fully informed choice to reach a particular agreement, but in the interest of preserving professionalism it is good practice for the mediator to make the parties aware of the importance of consulting other professionals where appropriate, to assist them make informed decisions.

II. Impartiality:

The concept of mediator impartiality is central to the mediation process. Impartiality means freedom from prejudice, bias and favoritism. A mediator shall at all times conduct mediation sessions in an impartial manner and avoid conduct that gives the appearance of partiality. A mediator shall only mediate a dispute in which there is reason to believe that impartiality can be maintained. If at any time the mediator is unable to conduct the process in an impartial manner, the mediator is obligated to withdraw.

Mediator's role:

(i) A mediator shall be impartial and advise all parties of any circumstances bearing on possible bias, prejudice, or impartiality. Impartiality means freedom from favoritism or bias in action, word and appearance. Impartiality implies a commitment to aid all parties, as opposed to an individual party, in moving toward an agreement.

(ii) A mediator shall maintain impartiality while raising questions for the parties to consider as to the reality, fairness, equity and feasibility of proposed options for settlement.

**ADR Association of Barbados Inc.
Code of Conduct for Mediators**

(iii) A mediator shall withdraw from mediation if the mediator believes the mediator can no longer be impartial.

(iv) A mediator shall not give or accept a gift, incidental items, services, request, favor, loan or any other item of value to or from a party, attorney, or any other person involved in and arising from any mediation process.

Comments:

The integrity of the mediation process is enhanced when the parties have confidence in the impartiality of the mediator. A mediator shall avoid all conduct that gives the appearance of partiality towards one of the parties or the other.

When mediators are appointed by a court or institution, the appointing agency shall make reasonable efforts to ensure that mediators serve impartially.

A mediator should guard against partiality or prejudice based on the parties' personal characteristics, background, values, beliefs or performance at the mediation.

III. Conflict of Interest:

A mediator must disclose all actual and potential conflicts of interest reasonably known to the mediator. After disclosure, the mediator may proceed with the mediation only if all parties consent to mediate. Nonetheless, if the mediator believes that the conflict of interest casts doubt on the integrity of the mediation process and the profession, the mediator shall decline to proceed.

Mediator's role:

(i) A mediator must disclose any current, past or possible future representation or consulting relationship, including any pertinent pecuniary interest with any party or attorney involved in the mediation. All disclosures shall be made as soon as practical after the mediator becomes aware of the interest or the relationship.

**ADR Association of Barbados Inc.
Code of Conduct for Mediators**

(ii) A mediator must disclose to the parties or to the court involved any close personal relationship or other circumstance, in addition to those specifically referred to here above, which might reasonably raise a question or doubt as to the mediator's impartiality. All disclosures shall be made as soon as practical after the mediator becomes aware of the interest or the relationship.

(iii) The burden of disclosure rests on the mediator. After appropriate disclosure, the mediator may serve if both parties so desire. If the mediator believes or perceives that there is a clear conflict of interest, the mediator should withdraw, irrespective of the expressed desires of the parties.

(iv) A mediator shall not provide counseling, business advice, legal advice, or therapy to either party during the mediation process, nor shall a mediator who is an attorney represent either party in any matter during the mediation.

(v) A mediator shall not use the mediation process to solicit, encourage or otherwise incur future professional services with either party.

(vi) A mediator shall avoid the appearance of conflict of interest both during and after the mediation. Without the consent of all parties, a mediator shall not subsequently establish a professional relationship with one of the parties in a related or in an unrelated matter under the circumstances which would raise legitimate questions about the integrity of the mediation process and profession.

Comments:

Potential conflicts of interest may arise between administrators of mediation programs and mediators and there may be strong influences and pressures on the mediator to settle a particular case or cases. The mediator's commitment must be at all relevant times to the parties and the process. Influence and pressures from the outside of the mediation process should never influence the mediator to coerce parties to settle.

A mediator shall avoid conflicts of interest in recommending the services of other professionals. A mediator may make reference to professional referral services or associations which maintain rosters of qualified professionals.

The duty to disclose potential conflicts includes the fact of membership on a board of directors, full-time or part-time service as a representative or advocate, consultation work for a fee, current stock or bond ownership (other than mutual fund shares or appropriate trust arrangements), or any other pertinent form of managerial, financial or immediate family interest of the party involved.

**ADR Association of Barbados Inc.
Code of Conduct for Mediators**

A mediator who is a member of a law firm is obligated to disclose any representational relationship the member firm may have had with the parties.

Mediators establish personal relationships with many attorneys, representatives and other members of various professional associations. Such friendships, relationships or acquaintances need not be disclosed unless some feature of a particular relationship might reasonably appear to impair impartiality.

IV. Competence:

A mediator shall only mediate when the mediator possesses the necessary and required qualifications to satisfy the reasonable expectations of the parties and the criteria set up by the ADR Association of Barbados Inc.

Mediator's role:

(i) A mediator appointed by the court shall have training and education; accreditation and certification by a reputable and recognized body in the mediation process, and shall have familiarity with the general principles of the subject matter involved in the case being mediated. A mediator shall be candid, accurate, and fully responsive to a court concerning the mediator's qualifications, availability, and all other pertinent matters. A mediator shall observe all administrative policies, rules of court, applicable procedural rules and statutes. A mediator is responsible to the judiciary for the propriety of the mediator's activities and must observe judicial standards of fidelity and diligence. A mediator shall refrain from any activity which has the appearance of improperly influencing a court to secure placement on a roster or appointment to a case, including gifts or other inducements to court personnel

(ii) A mediator shall have information available for the parties regarding the mediator's relevant training, education, experience in mediation, cultural understandings, other qualities necessary for mediator competence and approach related to a mediation process.

(iii) A mediator has the responsibility and the obligation to continuously strive to improve upon his/her professional skills, abilities and knowledge of the mediation process to maintain and enhance the mediator's knowledge and skills related to the mediation and promoting professional growth.

**ADR Association of Barbados Inc.
Code of Conduct for Mediators**

(iv) If a mediator, during the course of a mediation determines that the mediator cannot conduct the mediation competently, the mediator shall discuss that determination with the parties as soon as practicable and take the appropriate steps to address the situation, including, but not limited to, withdrawing or requesting appropriate assistance.

(v) A mediator must be of good moral character, and shall at all times maintain the highest standards of integrity, impartiality and professional competence in rendering his/her professional service.

(vi) If a mediator's ability to conduct mediation is impaired by drugs, alcohol, medication or otherwise, the mediator shall not conduct the mediation.

Comments:

When mediators are appointed by a court or institution, the appointing agency shall make reasonable efforts to ensure that each mediator is qualified for the particular mediation.

The requirements for appearing on a roster of mediators must be made public and available to interested parties.

V. Confidentiality: To protect the integrity of the mediation and the mediation process, a mediator shall not disclose any information obtained during mediation unless the parties expressly consent to such disclosure, or unless disclosure is required by applicable rules or law. A mediator shall not otherwise communicate any information to the court about the mediation, except: 1) whether the case has been resolved in whole or in part; or 2) whether the parties and/or attorneys appeared at a scheduled mediation.

Mediator's role:

(i) A mediator shall, prior to the commencement of mediation, reach agreement with the parties concerning the limits and bounds of confidentiality and non-disclosure.

(ii) A mediator shall preserve and maintain the confidentiality of all mediation proceedings, as well as protect the anonymity of the parties except where required by law to disclose information.

**ADR Association of Barbados Inc.
Code of Conduct for Mediators**

(iii) A mediator shall keep confidential from the other parties any information obtained in private sessions unless the party to the private session permits disclosure.

(iv) A mediator shall conduct mediation so as to provide the parties with the greatest protection of confidentiality afforded by court rule and mutually agreed to by the parties.

(v) A mediator shall maintain confidentiality in the storage and disposal of records and shall render anonymous all identifying information when such materials and information are used for research, training, or statistical compilations, except minimum identifiers necessary to link research documents.

Comments:

The parties may make their own rules with respect to confidentiality, or other accepted practice of an individual mediator or institution may dictate a particular set of expectations. Since confidentiality is a fundamental principle of the mediation process, and the parties expectations regarding confidentiality are paramount, the mediator should discuss these expectations with the parties.

If the mediator holds private sessions with a party, the nature of these sessions with regard to confidentiality should be discussed prior to undertaking such sessions. The mediator may inform the party prior to the private session that the mediator shall either disclose all the relevant information obtained during private session(s) to other party, unless told not to do so; or the mediator will not disclose any of the information obtained during private session(s) to the other party unless advised to do so.

In order to protect the integrity of the mediation, a mediator should avoid communicating information about how the parties acted in the mediation process, the merits of the case, or settlement offers. The mediator may report, if required, whether parties appeared at a scheduled mediation.

Where the parties have agreed that all or a portion of the information disclosed during a mediation is confidential, the parties agreement should be respected by the mediator.

Confidentiality should not be construed to limit or prohibit the effective monitoring, research, or evaluation of mediation programs by responsible persons. Under appropriate circumstances, researchers may be permitted to obtain access to the statistical data and, with the permission of the parties, to

individual case files, observations of live mediations and interviews with participants.

VI. Quality Of The Process:

A mediator shall work to ensure a quality process, to encourage mutual respect among the parties, and to restore harmony in their relationship with a view of preventing future conflicts. A mediator shall conduct the mediation fairly, diligently, professionally and in a manner consistent with the principle of self-determination by the parties to ensure a quality process.

Mediator's role:

(i) A mediator shall work to ensure a quality process and to encourage mutual respect and harmony among the parties, including a commitment by the mediator to diligence and to procedural fairness.

(ii) A mediator shall assess the case and determine that it is appropriate and suitable for continuing the mediation.

(iii) A mediator shall provide adequate opportunity for each party in the mediation to participate fully in the discussions, and allow the parties to decide when and under what conditions they will reach an agreement or terminate the mediation.

(iv) A mediator should postpone or cancel mediation if one of the parties is unable to participate in a mediation process for psychological or physical reasons, and until such time as all parties are willing and able to resume. The mediator may refer the parties to appropriate resources if necessary.

(v) A mediator shall not unnecessarily or inappropriately prolong a mediation session if it becomes apparent to the mediator that the case is unsuitable for mediation, or if one or more parties is unwilling or unable to participate in the mediation process in a meaningful manner.

(vi) A mediator shall only accept cases when the mediator can satisfy the reasonable expectations of the parties concerning the timetable for the process, and not allow a mediation to be unduly delayed by the parties or their representatives.

**ADR Association of Barbados Inc.
Code of Conduct for Mediators**

(vii) A mediator who is made aware of domestic abuse or violence among the parties shall take appropriate steps including, if necessary, postponing withdrawing from or terminating the mediation.

(viii) A mediator shall, where appropriate, recommend that parties seek outside professional advise or consider resolving their dispute through arbitration, counseling, neutral evaluation or other process.

(ix) A mediator who believes that a party does not understand or appreciate how an agreement may adversely affect legal rights or obligations, the mediator shall advise the parties to seek independent legal counsel. While a mediator may point out the possible outcomes of the case, under no circumstances may a mediator offer a personal or professional opinion as to how the court in which the case has been filed will resolve the dispute.

(x) A mediator who believes that participant conduct, including that of the mediator, jeopardizes conducting a mediation consistent with these standards, a mediator shall take the necessary steps including, if necessary, postponing, withdrawing or terminating the mediation.

Comments:

The primary purpose of a mediator is to facilitate the parties' voluntary agreement. This role differs substantially from other professional-client relationships. Mixing the role of a mediator and the role of a professional advising a client is problematic, and mediators must strive to distinguish between the roles. A mediator should, therefore, refrain from providing professional advice. Where appropriate, a mediator should recommend that the parties seek outside professional advice, or consider resolving their dispute through arbitration, counseling, neutral evaluation, or other processes. A mediator who undertakes, at the request of the parties, an additional dispute resolution role in the same manner assumes increased responsibilities and obligations that may be governed by the standards of other processes.

A mediator may agree to mediate only when the mediator is prepared to commit the attention essential to an effective mediation.

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

The presence or absence of persons at mediation depends on the agreement of the parties and the mediator. The parties and mediator may agree

**ADR Association of Barbados Inc.
Code of Conduct for Mediators**

that others may be excluded from particular sessions or from the entire mediation process.

A mediator shall withdraw from mediation when incapable of serving or when unable to remain impartial.

A mediator shall withdraw from mediation or postpone a session if the mediation is being used to further illegal conduct, or if the party is unable to participate due to drug, alcohol, or other physical or mental incapacity.

Mediators should not permit their behavior in mediation process to be guided by a desire for a higher settlement rate.

VII

Advertising and Solicitation: Advertising or any other communication with the public in respect of services offered or regarding the education, training, and expertise of the mediator shall be truthful and candid. Mediators shall refrain from promises and guarantees of results which imply favoritism to one side for the purpose of obtaining business.

Mediator's role:

(i) A mediator shall be truthful and not mislead when advertising, soliciting or otherwise communicating the mediator's qualifications, experience, the mediation process, benefits, services, and fees.

(ii) A mediator should only claim to meet the mediator qualifications of a governmental entity or private organization if that entity or organization has a recognized procedure for qualifying mediators and it grants such status to the mediator.

(iii) A mediator should not include any promises as to outcome in communications, including business cards, stationery, or computer-based communications.

(iv) A mediator shall not communicate to others, in promotional materials or through other forms of communication, the names of persons served without their permission.

(v) A mediator shall not solicit in a manner that gives an appearance of partiality for or against a party or otherwise undermines the integrity of the process.

Comments: It is imperative that communication with the public educates and instills confidence in the process. In an advertisement or other communication to the public, a mediator may make reference to meeting international, national or private organization qualifications only if the entity referred to has a procedure for qualifying mediators and the mediator has been duly granted the requisite status by the ADR Association of Barbados Inc.

VIII Remuneration:

A mediator shall fully disclose and explain any applicable fees and charges to the parties at the outset of a mediation to determine if they wish to retain the services of a mediator.

Mediator's Role:

(i) Fees charged by the mediator shall be reasonable, taking into account, all relevant factors, among other things, the subject area and the complexity of the matter, the qualifications and experience of the mediator, the time required, and the rates customary for such mediation services within the community.

(ii) A mediator shall provide all parties and/or their representatives' accurate and complete information about mediation fees, expenses and any other actual or potential charges that may be incurred in connection with a mediation in writing at the outset of the mediation.

(iii) A mediator shall not charge fees in a manner that compromises the mediator's neutrality. While the mediator may accept unequal fee payments from the parties, a mediator shall not enter into a fee agreement in which the amount of the fee is contingent upon the result of the mediation or the financial amount of the settlement, or that may adversely impact the mediator's ability to conduct a mediation in an impartial manner.

Comments:

A mediator occupies a position of trust with respect to the parties, the court and the community in general. In charging for services and expenses, the mediator must be governed by the same high standards of honor and integrity that applies to all other phases of the mediator's profession. A mediator must endeavor

**ADR Association of Barbados Inc.
Code of Conduct for Mediators**

to keep total charges for services and expenses reasonable and consistent with the nature of the case. If fees are charged, a mediator shall give a written explanation of the fees and related costs, including time and manner of payment, to the parties prior to the mediation. The particulars shall include:

1. The basis for and amount of charges, if any, for:

- (i) Mediation sessions;**
- (ii) Preparation for sessions;**
- (iii) Travel time;**
- (iv) Postponement or cancellation of mediation sessions by the parties and the circumstances under which such charges will normally be assessed or waived;**
- (v) Preparation of the parties' written mediation agreement; and**
- (vi) All other items billed by the mediator.**

2. (i) The parties' pro rata share of mediation fees and costs if previously determined by the court or agreed to by the parties.

(ii) A mediator shall maintain adequate records to support charges for services and expenses and shall make an accounting to the parties or to the court upon request.

(iii) No commissions, rebates, or similar remuneration shall be given or received by a mediator for referral of clients for mediation or related services.

3. A mediator should be guided by the following general principles:

- (i) Time charges for a mediation session should not be in excess of actual time spent or allocated for the session.**
- (ii) Time charges for a mediation session should not be spent.**
- (iii) Charges for expenses should be for expenses normally incurred and reimbursable in mediation cases and should not exceed actual expense.**
- (iv) When time or expenses involve two or more sets of parties on the same day or trip, such time and expense charges should be prorated appropriately.**
- (v) A mediator may specify in advance a minimum charge for a mediation session without violating this rule.**
- (vi) When a mediator is contacted directly by the parties for mediation services, the mediator has a professional responsibility to respond to questions regarding fees by providing a copy of the basis for charges for fees and expenses.**

**ADR Association of Barbados Inc.
Code of Conduct for Mediators**

- (vii) A mediator who withdraws from a mediation should return any unearned fee to the parties.
- (viii) Co-mediators who share a fee should hold to standards of reasonableness in determining the allocation of fees.

IX OBLIGATION TO AND ADVANCEMENT OF MEDIATION PRACTICE:

A mediator shall act in a manner that advances the practice of mediation. A mediator promotes this practice of advancement by engaging in some or all of the following:

Mediator's Role:

- (i) A mediator shall foster diversity within the field of mediation.
- (ii) A mediator shall strive to make mediation accessible to those who elect to use it, including providing services at a reduced rate or on a pro bono basis as appropriate.
- (iii) A mediator shall participate in research when given the opportunity, including obtaining participant feedback when appropriate.
- (iv) A mediator shall participate in outreach and education efforts to assist the public in developing an improved understanding of, and appreciation for mediation.
- (v) A mediator shall assist new mediators through training, mentoring, and networking.
- (vi) A mediator shall demonstrate respect for differing points of view within the field, seek to learn from other mediators and work together with other mediators to improve the profession and better serve people in conflict.
- (vii) A mediator has a professional responsibility to provide competent services to persons seeking their assistance, including those unable to pay for such services. As a means of meeting the needs of the financially disadvantaged, a mediator should provide mediation services 'pro bono' or at a reduced rate of compensation whenever appropriate.

Comments:

**ADR Association of Barbados Inc.
Code of Conduct for Mediators**

Mediators are regarded as knowledgeable in the process of mediation. They have an obligation to use their knowledge to assist in educating the public about mediation; to make mediation accessible to those who would like to use it; to correct abuses; and to improve their professional skills and abilities.

Mediators should support the advancement of mediation by encouraging and participating in research, evaluations, or other forms of professional development and public education.

CONCLUSION

There is a premise that mediation practices are social processes that play a major role in shaping and defining a community's cultural identity. Their responsibility is to the society as a whole. They embody the language, symbols, rituals, practices and values associated with that culture. Mediators perform the role of social educator, and are considered the guardians of moral conduct and social behavior.

Institutionalization of "foreign" models of mediation not only deprives the local community of a mechanism for propagating culture but may also dilute or replace traditional values.

The process of resolving conflict should be centered on restoring harmony and preventing future conflicts between the parties involved. The primary objective is to ensure harmonious relations among all persons within the disputants' network of family, friends, and neighbors with the ultimate aim of stabilizing the community.

There is an emphasis on interdependence, preservation of existing relationships, maintenance of each other's face, and re-affirmation of customary proper conduct between disputants in their defined role relationships.

A mediator also occupies the legitimate role of a guardian and advocate of community interests and values.

Respect and trust are the most important characteristics of a mediator; and for the mediation to succeed. If a mediator is respected, the disputants will 'listen' to her/his advice. Trust goes beyond legitimacy; trust is believing that the mediator takes responsibility and interest in resolving the conflict.

Mediators' responsibilities go beyond the management of the process. They are regarded as problem solvers. They look into issues; evaluate the case based upon

**ADR Association of Barbados Inc.
Code of Conduct for Mediators**

experience, and offer substantive recommendations on how the conflict should be resolved. Mediators address issues outside the individual and diffuse them into issues of collective community.

Mediators teach the parties what should be the correct way to interact or behave, thereby reinforcing the standard of “being human”, in maintaining social harmony.