



The South African Dispute Settlement Accreditation Council

Code of Professional Conduct for Mediators

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TABLE OF CONTENT

Code of Professional Conduct for Mediators.....	2
Definitions	2
1. Mediator appointment	2
2. Diligence, independence, neutrality, impartiality	3
3. Mediation Process	4
4. Confidentiality	5
5. Professional conduct issues and complaints	5

Code of Professional Conduct for Mediators

In order to ensure alliance with international standards, the Council has decided to adopt the code of professional conduct as prescribed by the International Mediation Institute.

The document here provided is based on the IMI Code of Professional Conduct, subject to necessary amendments to the definitions, and to section 1, to make it applicable to South African circumstances.

ASP's are entitled to adopt their own code of professional conduct, but every such code must be fundamentally compatible with the provisions as set out herein.

All mediators who apply for accreditation with the Council agree to also subject themselves to the provisions of this Code of Professional Conduct

Definitions

For the purposes of this Code:

Mediation is a form of dispute resolution in which an independent mediator aims to assist two (or more) disputants in reaching an agreement. Whether an agreement results or not, and the content of that agreement (if any), is determined by the parties themselves, rather than it being imposed by the mediator.

An *Accredited Mediator* (also called a *Mediator* in this Code) is one whose competency in the practice of mediation has been accredited by the Council, and whose name is entered into the Register as an accredited mediator.

An *Accredited Service Provider* ('ASP') is a mediation service provider which/who has been accredited by the Council as such.

The *Council* is the Dispute Settlement Accreditation Council ('DiSAC').

1. Mediator appointment

1.1 Entitlement to use the title '*Accredited Mediator*' and the Council logo

In the event that an Accredited Mediator fails to maintain the Council's requirements for accreditation, or no longer qualifies as an Accredited Mediator, use of the title *Accredited Mediator* and use of the Council's name and logo will terminate, and the mediator's profile will no longer be included on the Council Register.

1.2 Promotion of mediators' services

Subject to applicable laws and to regulations governing professional practice, mediators will present and promote their practice in a truthful way. They may quote freely from, and link to, the Council web portal.

1.3 Appointment

Before the mediation begins, mediators will advise the parties (in the mediation agreement or otherwise in writing):

- about their relevant qualifications
- under the auspices of which ASP the service is being conducted, and whose code of

professional conduct the mediator will observe

- which process will apply in the event of a party believing the mediator has not met the standards of the stated code of professional conduct
- that at the end of the mediation they will be invited to offer written feedback on the process and on the mediator's role, and
- whether they hold a current professional indemnity liability insurance policy covering their practice as a mediator.

2. Diligence, independence, neutrality, impartiality

2.1 Diligence

Mediators may accept an assignment to act as mediator in any situation where they feel competent to serve in that capacity.

2.2 Independence and Impartiality

2.2.1 Mediators will not accept an appointment without first disclosing anything within their knowledge that may, or may be seen to, materially affect their independence or impartiality. This duty to disclose is a continuing obligation throughout the mediation process.

2.2.2 The existence of circumstances potentially affecting, or appearing to affect, a Mediator's independence or impartiality will not automatically imply unfitness to act as a Mediator provided these circumstances have been fully disclosed and addressed to the satisfaction of the parties and the Mediator.

2.2.3 Mediators will always act in an independent and impartial way. They shall act in an unbiased manner, treating all parties with fairness, quality and respect. If at any time a Mediator feels unable to conduct the process in an independent and impartial manner, (s)he will express that concern and will offer to withdraw from the mediation. Such circumstances include:

- financial or personal interests in the outcome of the mediation
- existing past or future financial, business or professional relationship with any of the parties or their representatives about which the Mediator is aware
- other potential sources of bias or prejudice concerning a person or institution which may affect that Mediator's independence or impartiality or reasonably create an appearance of partiality or bias.

2.3 Conflicts of Interest

2.3.1 Mediators will conduct reasonable inquiries to determine if any conflicts of interests may exist. They will have a continuing duty to disclose any conflicts of interests that may become apparent during the mediation process.

2.3.2 Following any such disclosures, a Mediator will decline to participate as a Mediator in a particular case if any of the parties raises an objection, unless a contract or applicable law or court order nevertheless requires the Mediator's participation. Even then, if a Mediator personally believes that the matters disclosed would inhibit their actual impartiality, the Mediator should withdraw as the Mediator.

2.3.3 After accepting appointment, and until the mediation process ends, mediators will not enter into financial, business, professional, family or social relationships or acquire

financial or personal interests that are likely to create, or might reasonably create the appearance of, conflict of interest, partiality or bias, without making a prior disclosure to all the parties and gaining their consent.

- 2.3.4 For a period of 12 months following the end of a mediation, Mediators will not represent in an advisory capacity any party to a mediation in the same or a substantially related matter, unless all parties to the mediation expressly consent to that representation after full disclosure. Acting as a neutral in other dispute resolution proceedings (for example as a mediator or arbitrator) that may involve some or all of the parties will not be considered a *representation in an advisory capacity* for the purposes of this clause.

3. Mediation Process

3.1 Procedure

Mediators will satisfy themselves that the parties to the mediation and their advisers understand the characteristics of the mediation process, their roles as parties and advisers, and the role of a mediator. The mediator will ensure that before the mediation begins, the parties have understood and agreed the terms and conditions which will govern the mediation including, those relating to obligations of confidentiality on the mediator and on the parties. It is best practice for those terms to be contained in a written mediation agreement unless the parties or the circumstances dictate otherwise.

3.2 Fairness and Integrity of the process

- 3.2.1 Mediators will ensure that, if there are to be any pre-mediation private communications with the mediator, all parties are aware they will have equal opportunity to raise issues.
- 3.2.2 Mediators will explain the mediation process to the parties and their advisers, and be satisfied that that they consent to the process being used and to the mediator selected (unless applicable law, court rules, contract or court directive require use of a particular process and/or mediator).
- 3.2.3 Mediators will conduct the process with fairness to all parties and will take particular care to ensure that all parties have adequate opportunities to be heard, to be involved in the process and to have the opportunity to seek and obtain legal or other counsel before finalising any resolution.
- 3.2.4 Mediators will take reasonable steps to prevent any misconduct that might invalidate an agreement reached at mediation or create or aggravate a hostile environment. Mediators will also be satisfied that the parties have reached agreement of their own volition and knowingly consent to any resolution.

3.3 Termination of the process

- 3.3.1 The Mediator will ensure the parties understand that they may withdraw from the mediation at any time by informing the mediator and all other parties without being required to give any justification for doing so.
- 3.3.2 Mediators shall withdraw from a mediation if a negotiation among the parties assumes a character that to the Mediator appears unconscionable or illegal.

3.4 Feedback

Parties engaged in a mediation must be informed that they are welcome to provide feedback or complaints regarding the mediator's conduct to the ASP under whose auspices the mediation took place, in order to assist in the continued evaluation of professional conduct.

3.5 Fees

Parties to a mediation must, prior to the start of the mediation, be aware of how the fees and expenses for the mediation will be calculated, and how they will be paid by the parties (and if shared between the parties, in what proportions.)

4. Confidentiality

4.1.1 Mediators will keep confidential all information acquired in the course of serving as a mediator in a mediation, including the fact of mediation being held, unless:

- compelled to make a disclosure by law, or by a court of law
- required under paragraph 5.1, in which event the recipients of the confidential information shall themselves be bound to maintain the confidentiality, or
- the specific information comes into the public domain (otherwise than as a result of a disclosure by the mediator), or
- the parties release the mediator from the confidentiality restriction, or
- necessary to defend the mediator from any proceedings or charges for which (s)he risks incurring any liability.

4.1.2 The mediator may, however, disclose having previously served as a mediator in a mediation involving one or more of the parties, provided none of the details of that case are disclosed.

4.2 Mediators will discuss confidentiality with the parties before or at the beginning of the mediation and obtain their consent to any communication or practice by the mediator that involves the disclosure of confidential information.

4.3 Mediators may use or disclose confidential information obtained during a mediation when, and to the extent that, they believe it to be necessary to prevent death or serious physical harm or physical damage from arising or believe an illegal act may realistically arise. Before using or disclosing such information, if not otherwise required to be disclosed by law, mediators must, if they consider it appropriate, make a good faith effort to persuade the party and/or the party's counsel or other advisers, to act in such a way that would remedy the situation.

4.4 At no time will mediators adduce evidence or testify on behalf of one of the parties in making or defending a claim against another party to the same mediation where they have acquired confidential information from the other party, unless all that information is no longer confidential or unless the party protected by the confidentiality gives consent, or is so ordered by a court.

5. Professional conduct issues and complaints

5.1 An accredited mediator may consult his/her ASP about any professional or ethical dilemmas.

5.2 Where an accredited mediator is subject to this Code, a party to a mediation who believes there has been a lack of compliance with the Code may activate the *complaints*

and disciplinary process of the ASP under whose auspices the mediation took place.