

OREGON MEDIATION ASSOCIATION CORE PRINCIPLES OF MEDIATION PRACTICE

PREAMBLE

These Core Principles of Mediation Practice are designed as an educational tool to: 1) assist mediators in Oregon, 2) inform participants about mediation, and 3) promote public confidence in mediation as an effective and productive process for resolving disputes. Each member of the Oregon Mediation Association (OMA) agrees to use these aspirational Core Principles as a guide for conducting mediations in a manner that promotes trust and confidence in the mediation process.

OMA recognizes the complexity of our roles as mediators, our individual practice areas, and the full spectrum of our personal, professional, and cultural diversity surrounding styles, behaviors, techniques, processes and philosophies. OMA values and supports these differences, and these Core Principles should not be construed to favor any particular approach.

While mediation evolves toward an independent profession, OMA encourages practitioners to continuously strive toward a set of values and behaviors that reflect their core professionalism. These Core Principles represent a next step in the ongoing development of mediation as a tool that truly allows participants a viable and reliable choice when determining the appropriate manner in which to resolve their differences. These Core Principles are not intended to dictate conduct in a particular situation, define “competency,” establish “best practices,” or create a “standard of care.”

When these Core Principles conflict with or are silent on, subjects covered by applicable laws, regulations, professional licensing rules, professional ethical codes or contracts by which the mediator may be bound, mediators and participants should be aware that those requirements may take precedence over these Core Principles.

DEFINITIONS

Mediation is defined in Oregon as “a process in which a mediator assists and facilitates two or more parties to a controversy in reaching a mutually acceptable resolution of the controversy and includes all contacts between a mediator and any party or agent of a party, until such time as a resolution is agreed to by the parties or the mediation process is terminated.” (Oregon Revised Statutes Section 36.110(6).) This broad definition often includes “facilitation.”

Party under Oregon law is defined as follows: “. . . a person, state agency or other public body is a party to a mediation if the person or public body participates in a mediation and has a direct interest in the controversy that is subject of the mediation. (Oregon Revised Statutes Section 36.234.)

Participant is used in these Core Principles as a substitute for the term **Party** because the term is less adversarial and better reflects the important differences between mediation and litigation.

I. SELF-DETERMINATION

Mediation respects, values and encourages the participants' ability to make their own decisions regarding what process to use, and whether and on what terms, to resolve their disputes.

Comments

1. Self-determination is the fundamental principle of mediation that best distinguishes it from the litigation system. Participants should be free to choose their own dispute resolution process, and are encouraged to make their own decisions on all issues.
2. Mediation respects the culture, rights, autonomy, and beliefs of the participants. Mediators should defer their own views to those of the participants, recognizing that the collaborative interaction between the participants is the key to resolution.
3. Participants benefit when mediators educate them about the continuum of mediation techniques and which techniques the mediator practices. Engaging the participants in a collaborative process to establish expectations surrounding the use of these techniques may help the participants make an informed decision about the type of mediation best suited for their particular process.
4. While a mediator cannot personally ensure that participants are making informed decisions, mediation works well when each participant is able to understand the process, issues and options, and is making decisions voluntarily.
5. Participants often benefit when mediators ask them to consider the benefits of mediation and agreement, versus the costs of non-participation and impasse.
6. Participants, who are unable or unwilling to participate effectively in the mediation process, should be free to suspend or withdraw from the mediation process, even when mediation is "mandatory." Mediators should respect a participant's decision to continue or end the process.
7. Mediators may, but should not be expected to suspend, end or withdraw from the mediation process if they believe one or more of the participants are unable to make voluntary decisions.

II. INFORMED CONSENT

To fully support self-determination, mediation respects, values and encourages participants to develop and exercise informed consent throughout the mediation process. This includes procedural decisions regarding the mediation practitioner or process, and substantive issues regarding possible resolutions. Informed consent is supported when mediators make appropriate disclosures about themselves and the specific mediation process being used initially and throughout the mediation.

Comments

1. Informed consent is an important part of the participants' right to self-determination.
2. Informed consent is supported when mediators disclose or offer to disclose the information reasonably necessary for informed decisions on whether to use the mediator and whether to participate in the specific mediation process. Mediators are encouraged to explain the mediation process and the roles of the mediator, the participants, their representatives, and others in attendance.
3. The integrity of the mediation process is supported when mediators disclose information regarding conflicts of interest, fees, relationships, process competency, and substantive

knowledge, and continue to do so throughout the mediation process. Mediator disclosures should be truthful and not misleading by omission.

4. Mediators are encouraged to make ongoing, good faith efforts to assess the participants' ability to make voluntary choices consistent with their rights of self-determination, and may discontinue the mediation under circumstances manifesting a participant's inability to give informed consent.
5. Participants are better able to provide informed consent and exercise self-determination when they are aware of the importance of consulting other professionals to assist them.
6. If a participant withdraws from a multi-participant mediation, the mediation may continue with the informed consent of the remaining participants, and their understanding that the withdrawing participant is not bound by any subsequent agreement.

III. IMPARTIAL REGARD

Participants are reasonably entitled to have mediators act in an evenhanded manner, and the mediation process is enhanced when the participants have confidence in the mediator's fairness and neutrality. Mediators are encouraged to demonstrate impartial regard throughout and after the mediation process by conducting the mediation fairly, diligently, and in a manner consistent with the standards of Self-Determination and Informed Consent.

The appearance of neutrality and fairness is compromised when the mediator has an actual, potential or perceived conflict of interest.

Where a participant questions the mediator's ability to give impartial regard and the issue cannot be resolved satisfactorily, the mediator should decline to serve or withdraw.

Comments

1. Mediators are encouraged to disclose to the participants' expressed satisfaction on an ongoing basis any circumstances that reasonably raise a question as to the mediator's ability to demonstrate impartial regard, including actual and potential conflicts of interest reasonably known to the mediator and any present or prior relationship, personal or professional, between the mediator and any participant, their representative or other person in attendance
2. Participants may give their informed consent to use a mediator after disclosure of offer to disclose.
3. Mediators are encouraged to exercise their independent judgment and not serve when the mediator's ability to demonstrate impartial regard is compromised, or appears to compromise that ability because of the mediator's personal biases, views, or reactions to any position, participant, or other person in attendance.
4. Mediators are not advocates for higher settlement rates.
5. Mediators are encouraged to make reasonable efforts to explain they are not acting on behalf of or representing any participant. Mediators are encouraged to advise participants with or without attorneys to seek independent legal advice and review of any documents prepared by the mediator.
6. Mediators should make good faith efforts to avoid conflicts of interest in recommending the services of other professionals.

7. When a mediator is appointed to mediate, rather than selected by the parties, the appointing agency or authority should make reasonable efforts to ensure the mediator demonstrates impartial regard.

IV. CONFIDENTIALITY

- A. Participants should be aware of the confidentiality laws and exceptions surrounding mediation communications. These include issues of confidentiality, non-discoverability and inadmissibility.**
- B. Participants' expectations often depend on the type of dispute, the circumstances of the mediation, and their agreements surrounding confidentiality. Mediators are encouraged to discuss confidentiality issues as soon as is practical and maintain the reasonable, articulated expectations of the participants.**

Comments

1. Mediators are encouraged to understand the various laws regarding confidentiality, open meetings, public records, and the exceptions to those rules.
2. Mediators are encouraged to discuss confidentiality rules with the participants before confidential information is provided in private sessions during the mediation process.
3. The mediation process is not well served when mediators communicate information about how participants acted, even when not revealing substantive communications.
4. Mediators are encouraged not to use information acquired during mediation to gain personal advantage for themselves or others.

V. PROCESS AND SUBSTANTIVE COMPETENCE

Mediators and participants are encouraged to discuss the participants' expectations surrounding the desired process and the substantive knowledge, skills, and abilities of the mediator. Mediators are encouraged to fully and accurately represent their knowledge, skills, abilities or limitations, in order to satisfy the participant' reasonable expectations.

Comments

1. Mediators are encouraged to exercise their independent judgment when the mediator's abilities and/or availability are unlikely to satisfy the participants' articulated expectations. When exercising their judgment about mediating a particular dispute, mediators should consider factors such as the participant-agreed style of mediation, the complexity and subject matter of the dispute, the specific issues, and the participants involved..
2. Mediators should strive to satisfy the reasonable expectations of the participants concerning process timing by raising issues of undue delay by the participants, representatives and others in attendance.
3. Mediators are encouraged to have, maintain and improve the process skills and substantive knowledge necessary to reasonably satisfy the expectations of the participants in the matters they mediate.
4. Mediators should have information relevant to their training, education and experience available for the participants' review.

5. When a court or organization appoints mediators, it should make reasonable efforts to ensure that each mediator is qualified and the requirements for appearing on a mediator roster should be available to the public.

VI. ENCOURAGE GOOD FAITH PARTICIPATION

Participants can improve the mediation process and probability of success when they participate in good faith. Mediators are encouraged to exercise independent judgment and withdraw if, in their judgment, a participant's lack of good faith meaningfully affects the integrity and fundamental fairness of the process.

Comments

1. Mediators are not guarantors of the participants' good faith participation.
2. Mediators are encouraged to discuss concerns surrounding good faith participation and the resulting impact on the process in a manner that does not violate confidentiality rules. Mediators should reveal lack of good faith participation to others only when required by law.

VII. FEES

- A. Participants should have, as soon as practical and prior to substantive discussions, a reasonable understanding of the basis for any mediator compensation, fees, and costs, including the source of the payment.**
- B. Mediator and co-mediator fees should be reasonable, considering, among other things, the mediation service, the type and complexity of the matter, the expertise of the mediator, the time required, and the rates customary in the community.**
- C. Mediators should consider the impact on their impartial regard when they charge contingent fees or fees based, in advance, on the outcome of the mediation or amount of the settlement, or accept or pay anything of value for a mere referral.**

Comments

1. Mediators should inform participants as soon as practical of any compensation, fees, and costs, including the source of the payment.
2. Mediators may pay for listings or membership in referral organizations or services, and accept referrals from those organizations or services.
3. Mediators who charge fees are encouraged to have written fee policies or agreements.
4. Mediators should promptly account for and return any unearned compensation, fees and costs.

VIII. ADVERTISING AND SOLICITATION

Mediators should be truthful in advertising and solicitation activities. Mediators are encouraged to refrain from making promises or guarantees of specific results.

Comments

1. Persons who make themselves publicly available to serve as mediators create the reasonable expectation that they are competent.

2. Mediators should claim organizational qualifications only if the organization has a formalized procedure, the procedures are readily available to the public, and the mediator currently holds the stated status.

IX. DUAL ROLE SITUATIONS

- A. Mediators are encouraged to engage only in the role(s) the participants consent to during mediation or any hybrid process. (E.g. “med-arb” or “arb-med”). Participants should be aware of the advantages and disadvantages associated with a mediator providing legal advice, therapy, counseling or other professional services and provide their informed consent.**
- B. After the mediation process is completed, mediators are encouraged to consider the impact that providing additional services for any participant may have on the other participants’ view of the mediator’s impartial regard. Mediators should not engage in any other services for any of the participants involving the same or significantly related issues, unless the other participants provide their informed consent.**

Comments

1. Mediating the voluntary agreement of the participants differs substantially from other service relationships. A dual-role is created when the mediator provides additional services to the participants. A dual role is not created by providing referrals, information, facilitation, education, and/or training.
2. Dual roles can be challenging and participants should be able to distinguish between the different services provided by the different roles. It can be more effective for the mediator to recommend professional advice from someone else. Mediators who undertake a dual role assume increased obligations.
3. Licensed professionals who are serving as mediators or in a dual role are bound by ethical and regulatory codes unique to their profession of origin. Mediators should educate themselves and inform the participants about the impact of their licensed status on the conduct of the mediation.
4. Participants are free to select what process to use, including hybrid processes, and whether and on what terms to resolve their disputes.

X. ADDITIONAL COMMENTS

This Standard provides additional guidance for mediators.

Comments

1. Mediators are encouraged to improve and promote mediation by sharing their knowledge and skills with others and by using conflict resolution skills in their own activities.
2. Mediators are encouraged to make mediation accessible to everyone.
3. Mediators who charge a fee are encouraged to have malpractice insurance.
4. Mediators are encouraged to participate in mediation of any situation that gives raise to an attributed concern about a mediator’s conduct. The goals are education and understanding between the concerned party and the mediator, not discipline.
5. Mediators are encouraged to have a secure file storage policy known to the participants.
6. Mediators should be aware of the unlawful practice of law rules where they mediate.

7. Mediators are encouraged to provide these Core Principles to the mediation participants in advance of the first mediation session if practical.