

## NEBRASKA STANDARDS OF PRACTICE AND ETHICS FOR FAMILY MEDIATORS

The Nebraska Standards of Practice and Ethics for Family Mediators have three primary goals: (1) to serve as a guide for the conduct and practice of Parenting Act and family mediators; (2) to inform the mediating parties about mediation practice; and (3) to instill public confidence in the mediation process. Neb. Rev. Stat. § 43-2940 (1) (Supp. 2007) states: “Mediation of cases under the Parenting Act shall be governed by uniform standards of practice adopted by the State Court Administrator.” These standards are adapted from existing codes of conduct and standards for mediators, including the Model Standards of Practice for Family and Divorce Mediation, adopted and approved by the Association of Family and Conciliation Courts (AFCC) in 2000 and the American Bar Association House of Delegates in 2001; the AAA/ABA/ACR Model Standards of Conduct for Mediators (2005); the Nebraska Office of Dispute Resolution (ODR) Manual of Standards and Ethics for Center Mediators (2001); the Nebraska Parenting Act (2008); the Nebraska Dispute Resolution Act (1991); and the Nebraska Uniform Mediation Act (2003).

### I. INTRODUCTION

These standards serve as the foundation for the standards and conduct of mediators practicing Parenting Act and family mediation in the state of Nebraska. They set out standards of behavior and ethical considerations for mediators in relationship to the parties in dispute, fellow mediators, and the citizens of Nebraska.

Nothing in these standards should be interpreted to establish or augment any substantive legal duty on the part of mediators. Violation of a Standard shall not give rise to a cause of action nor shall it create any presumption that a legal duty has been breached. However, violation of the Standards of Practice and Ethics for Family Mediators may result in disqualification from rosters of approved Parenting Act Mediators.

### II. SCOPE, DEFINITION, MEDIATOR’S ROLE, GENERAL PRINCIPLES, AND EFFECTIVE DATE.

**A. Scope.** The Standards set out in this document shall apply to all family mediators practicing under the Nebraska Parenting Act. The Nebraska Office of Dispute Resolution (ODR) recommends that all family mediators practicing in the State of Nebraska adhere to these standards.

**B. Definition of Mediation.** Mediation is a confidential process of dispute resolution in which one or more trained impartial neutrals assists the participants without coercion or the appearance of coercion to define and clarify issues and interests, reduce obstacles to communication, explore possible solutions, and where desired, reach a mutually satisfactory agreement. Party self-determination is a core value of mediation, in which the decision-making authority rests with the participants themselves.

**C. Mediator’s Role.** In mediation, decision-making authority rests with the disputing parties. This role may include, but is not limited to, assisting the parties to identify issues, help the parties in conflict to talk to and listen to each other, facilitate communication, focus on each other’s needs and interests, maximize the exploration of alternatives or options, and to support the parties to voluntarily achieve resolution of the problem.

**D. General Principles.** Mediation is based on principles of communication, negotiation, facilitation, and the technique or method of solving problems. It emphasizes:

- party self-determination;
- the needs and interests of the disputing parties;
- fairness and merits of the issues as defined by the parties;
- procedural flexibility;
- privacy and confidentiality;
- full disclosure.

**E. Effective Date.** The effective date of these Standards is \_\_\_\_\_.

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FOR FAMILY MEDIATORS**

**SUMMARY**

**STANDARD I                    SELF-DETERMINATION**

*A family mediator shall recognize that mediation is based on the principle of self-determination by the participants.*

**STANDARD II                EDUCATION AND TRAINING**

*A family mediator shall be qualified by education and training to undertake the mediation.*

**STANDARD III              MEDIATOR DUTY TO ASSESS & INFORM**

*A family mediator shall facilitate the participants' understanding of the components of a parenting plan as defined by The Parenting Act, how the participants can use mediation to address parenting plan or other issues and assess the participants capacity to mediate before they reach an agreement to mediate.*

**STANDARD IV              IMPARTIALITY AND CONFLICT OF INTEREST**

*A family mediator shall conduct the mediation process in an impartial manner. A family mediator shall disclose all actual and potential grounds of bias and conflicts of interest reasonably known to the mediator.*

**STANDARD V                DISCLOSURE OF FEES**

*A family mediator shall fully disclose and explain the basis of any compensation, fees, and charges to the participants.*

**STANDARD VI              PARTICIPANT DECISION-MAKING**

*A family mediator shall structure the mediation process so that the participants make decisions based on self-determination. The family mediator will support the participants' efforts to gain sufficient information and knowledge in order to exercise self-determination.*

**STANDARD VII             CONFIDENTIALITY**

*A family mediator shall maintain the confidentiality of all verbal and written information acquired in the mediation process, unless the mediator is permitted or required to reveal the information by law or agreement of the participants.*

**STANDARD VIII          BEST INTERESTS OF THE CHILD**

*A family mediator shall assist participants in determining how to promote the best interests of children.*

**STANDARD IX              CHILD NEGLECT OR ABUSE**

*A family mediator shall recognize a family situation involving child abuse or neglect and take appropriate steps to shape the mediation process accordingly.*

**STANDARD X                DOMESTIC INTIMATE PARTNER ABUSE**

*A family mediator shall recognize a family situation involving domestic intimate partner abuse and take appropriate steps to shape the mediation process accordingly.*

**STANDARD XI              SUSPENSION OR TERMINATION OF PROCESS**

*A family mediator shall suspend or terminate the mediation process when the mediator reasonably believes that a participant is unable to effectively participate or for other compelling reasons.*

**STANDARD XII             MEDIATION ADVERTISEMENT AND SOLICITATION**

*A family mediator shall be truthful in the advertisement and solicitation for mediation.*

**STANDARD XIII          MEDIATOR COMPETENCY**

*A family mediator shall acquire and maintain professional competence in mediation.*

## **STANDARD I                      SELF-DETERMINATION**

*A family mediator shall recognize that mediation is based on the principle of self-determination by the participants.*

- A. A mediator shall conduct a mediation based on the principle of party self-determination. Self-Determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome. Parties may exercise self-determination at all stages of mediation, including mediator selection, process design, the nature of their participation in the process, and outcomes.
- B. 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.
- C. A mediator cannot personally ensure that each party has made free and informed choices to reach particular decisions, but, where appropriate, a mediator should make the parties aware of the importance of consulting other professionals to help them make informed choices.
- D. A mediator shall not undermine party self-determination by any party for reasons such as higher settlement rates, egos, increased fees, or outside pressures from court personnel, program administrators, provider organizations, the media or others.
- E. A family mediator's commitment shall be to the participants and the process. Pressure from outside of the mediation process shall never influence the mediator to coerce the participants to settle.
- F. A family mediator shall inform the participants that they may withdraw from family mediation, after attendance at any legally required sessions, at any time and are not required to reach an agreement in mediation.

## **STANDARD II                      EDUCATION AND TRAINING**

*A family mediator shall be qualified by education and training to undertake the mediation.*

- A. A family mediator shall have taken basic and family mediation training approved by the Nebraska Office of Dispute Resolution and shall have served as an apprentice, which apprenticeship shall include co-mediating at least three parenting plan cases with at least two, and preferably three, different supervisory family mediators.
- B. Training shall include, but not be limited to:
  - 1. Knowledge of family law and the Nebraska Parenting Act;
  - 2. Knowledge of and training in the impact of family conflict on parents, children, and other participants;
  - 3. Knowledge of child development, child abuse and neglect, and domestic intimate partner abuse, including knowledge of provisions for safety, transition plans, domestic intimate partner abuse screening protocols, and mediation safety procedures;
  - 4. Education and training specific to the process of mediation;
  - 5. Knowledge of the impact of culture and diversity in family matters;
  - 6. Knowledge of resources in the state to which parties and children can be referred to for assistance.
  - 7. Other requirements as set forth by the Nebraska State Court Administrator or the Office of Dispute Resolution in the Education and Training Guidelines developed for family mediators under the Parenting Act.
- C. Family mediators should disclose their qualifications to mediate the family dispute.
- D. A mediator who serves as a specialized mediator for parents involved in high conflict and situations in which abuse is present shall meet additional requirements, including:
  - 1. Satisfactory completion of a specialized alternative dispute resolution domestic mediation training course as approved by the Nebraska ODR.
  - 2. Meeting the minimum standards of family mediators, above;
  - 3. Affiliation with an ODR approved mediation center or conciliation court; and
  - 4. Other requirements as set forth by the Nebraska State Court Administrator or the Office of Dispute Resolution in the Education and Training Guidelines developed for family mediators under the Parenting Act.

### **STANDARD III                    MEDIATOR DUTY TO ASSESS & INFORM**

*A family mediator shall facilitate the participants' understanding of the components of a parenting plan as defined by The Parenting Act, how the participants can use mediation to address parenting plan or other issues and assess the participants capacity to mediate before they reach an agreement to mediate.*

- A. A family mediator shall conduct an Individual Private Session (IPS) with each party to a parenting conflict. These meetings are defined as separate discussions between the mediator and each of the parties involved in the conflict prior to any joint session. The family mediator will make reasonable efforts to have these discussions face-to-face with the participants.
- B. The purposes of the IPS are to:
  - 1. Screen for the presence of child abuse or neglect, domestic intimate partner abuse, and unresolved parental conflict;
  - 2. Determine if mediation, facilitation or SADR facilitation is appropriate;
  - 3. Provide the dialogue and information necessary for the parties to determine their role in mediator selection, process design, the nature of their participation in the process, and outcomes;
  - 4. Inform the participants that physical safety and the principle of party self-determination are primary; that the mediator is an impartial facilitator; that the participant may withdraw from family mediation, after attendance at any legally required sessions, at any time; that a mediator shall not impose or force any settlement upon the parties;
  - 5. Distinguish family mediation from other processes designed to address family issues and disputes such as counseling, arbitration or litigation;
  - 6. Inform the participants that any agreements reached are subject to court rules when court rules apply and will be reviewed by the court if court approval is required;
  - 7. Inform the participants that they may seek advice from attorneys, counsel, advocates, accountants, therapists, religious figures, elders or other significant persons in their lives at any stage of the mediation process.
  - 8. Discuss the possibility of separate sessions with the participants; a description of the circumstances in which the mediator may meet alone with any of the participants during mediation; a description of the circumstances in which the mediator meets alone with the participants during a Specialized ADR facilitation; and confidentiality concerning these separate sessions;
  - 9. Describe the obligations of the mediator to maintain the confidentiality of the mediation process and its results as well as any relevant exceptions to confidentiality (including those related to reporting child abuse and imminent physical danger towards self and others); and
  - 10. Advise the participants of the circumstances under which the mediator may suspend or terminate the mediation process and under which a participant may suspend or terminate the mediation.

### **STANDARD IV                    IMPARTIALITY AND CONFLICT OF INTEREST**

*A family mediator shall conduct the mediation process in an impartial manner. A family mediator shall disclose all actual and potential grounds of bias and conflicts of interest reasonably known to the mediator.*

#### *Impartiality*

- A. A mediator shall provide mediation services in an impartial manner. Impartiality means freedom from favoritism, bias, or prejudice based on any participant's personal characteristics, background, values and beliefs, performance at the mediation, or any other reason.
- B. A mediator shall be impartial in word, action, and appearance and committed to aiding all parties as opposed to a single party. The mediator may employ different techniques to assist parties based on their diverse needs, but shall avoid conduct that raises a question as to the mediator's actual or perceived impartiality.
- C. A mediator shall be impartial to the contents of the parties' decisions and agreements while raising questions about the feasibility of options under consideration or their impact. Under no circumstances may a mediator make a substantive decision for a party or coerce a party into reaching agreement.

- D. A mediator shall identify and disclose potential grounds of bias upon which a mediator's impartiality might reasonably be questioned. Such disclosure should be made prior to the start of a mediation or as soon as practical after the mediator becomes aware of the bias. The duty of the mediator to monitor impartiality and to disclose to the parties information that might reasonably create the appearance of impartiality is a continuing duty.
- E. A mediator shall decline or withdraw from a mediation if the mediator cannot be impartial with respect to all of the parties or the subject matter of the dispute. If at any time a mediator is unable to conduct a mediation in an impartial manner, the mediator shall so inform the parties and withdraw from providing services, regardless of the desires of the parties. If a party states a belief that the mediator is biased or showing favoritism, but the mediator believes he or she can conduct the mediation in an impartial manner, the mediation should proceed only if all parties state agreement to do so.
- F. A mediator has a duty to remain impartial as to whether the parties use mediation or some other process to resolve the dispute. Under no circumstances may a mediator coerce a party into continuing mediation.
- G. A mediator shall not use information about participants obtained in a mediation for personal gain or advantage.
- H. It is understood that all mediators, as human beings, have personal biases. Mediators are expected to be aware of their own biases and preventing any personal bias from influencing the mediator's conduct of a mediation.

*Conflict of Interest*

- I. A mediator shall avoid a conflict of interest or the appearance of a conflict of interest during and after a mediation that could impact the mediator's ability to be impartial. Conflict of interest means any relationship between the mediator, any participant, or the subject matter of the dispute that compromises or appears to compromise the mediator's impartiality.
- J. The mediator shall disclose, as soon as practicable, conflicts of interest that are reasonably known to the mediator and could reasonably be seen as raising a question about the mediator's impartiality. After disclosure, if all parties agree, the mediator may proceed with the mediation.
- K. As part of the individual screening and pre-mediation session, and ongoing in the process, the mediator shall make an inquiry to determine whether there are any known facts that could reasonably be seen as indicating a conflict of interest, including a financial or personal interest in the outcome of the mediation.
- L. Subsequent to a mediation, a mediator shall not establish another relationship with any of the participants in the same matter that would raise questions about the integrity of the mediation.
- M. A mediator shall not accept or give a gift, request, favor, loan, or any other item of value to or from a party, attorney or any other person involved in any pending or scheduled mediation, which would compromise the integrity of the mediation.
- N. No mediator who represents or has represented one or both of the parties or has had either of the parties as a client as an attorney or a counselor shall mediate the case, unless such services have been provided to both participants and mediation shall not proceed in such cases unless the prior relationship has been disclosed, the role of the mediator has been made distinct from the earlier relationship, and the participants have been given the opportunity to fully choose to proceed.

**STANDARD V DISCLOSURE OF FEES**

*A family mediator shall fully disclose and explain the basis of any compensation, fees, and charges to the participants.*

- A. The participants should be provided with clear information about fees at the outset of mediation to determine if they wish to retain the services of the mediator. This information will include all costs incurred by the mediating parties.
- B. The participants' written agreement to mediate their dispute should include a description of their fee arrangement with the mediator.
- C. A mediator should not enter into a fee agreement that is contingent upon the results of the mediation or the amount of the settlement.
- D. Fees shall be consistently applied to mediating parties without favoritism or bias. This does not preclude the use of a sliding fee scale based on income or resources of the parties.

## **STANDARD VI PARTICIPANT DECISION-MAKING**

*A family mediator shall structure the mediation process so that the participants make decisions based on self-determination. The family mediator will support the participants' efforts to gain sufficient information and knowledge in order to exercise self-determination.*

- A. The family mediator shall support the participants' efforts to fully and accurately disclose, acquire and develop information during mediation so that the participants can make informed decisions. This may be accomplished by encouraging participants to consult appropriate experts.
- B. Consistent with standards of impartiality and preserving participant self-determination, a mediator may provide the participants with information that the mediator is qualified by training or experience to provide. The mediator shall not provide therapy or give legal advice.
- C. If the participants so desire the mediator should allow attorneys, counsel, or some other individual designated by a party to accompany the party to, and participate in a mediation session.
- D. With the agreement of the participants, the mediator may document the participants' resolution of their dispute. The mediator should inform the participants that any agreement should be reviewed by an attorney before it is finalized.

## **STANDARD VII CONFIDENTIALITY**

*A family mediator shall maintain the confidentiality of all verbal and written information acquired in the mediation process, unless the mediator is permitted or required to reveal the information by law or agreement of the participants.*

- A. The family mediator shall (1) explain confidentiality to the participants; (2) inform the participant of any relevant limitations of confidentiality, including reporting child abuse and imminent physical danger towards self or others; and (3) discuss the participants' expectations of confidentiality. This disclosure shall be part of the introductory phase of the mediation process. The written agreement to mediate should include provisions relating to confidentiality.
- B. A family mediator must also notify the parties that, if the mediator has reasonable cause to believe that a child has been subjected to child abuse or neglect or if the mediator observes a child being subjected to conditions or circumstances which reasonably would result in child abuse or neglect, the mediator is obligated under Neb. Rev. Stat. Section 28-711 to report such information unless the information has been previously reported.
- C. As permitted by law, the mediator shall disclose a participant's threat of suicide or violence against any person to the appropriate authorities and may disclose such to the threatened person, if the mediator believes such a threat is likely to be acted upon.
- D. If the mediator holds private sessions with a participant, the obligations of confidentiality concerning those sessions should be discussed and agreed upon at the beginning and conclusion of each session.
- E. If subpoenaed or otherwise noticed to testify or to produce documents the mediator should inform the participants immediately. Mediation communication is privileged unless:
  - 1. A written waiver is signed by all parties to the agreement.
  - 2. The session was open to the public.
  - 3. The communication must be disclosed by state law because it is a threat or statement of a plan to inflict bodily injury or commit a crime of violence.
  - 4. Intentionally used to plan a crime, attempt to commit a crime, or conceal an ongoing crime or ongoing criminal activity.
  - 5. Sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice against a mediator.
  - 6. Sought or offered to prove or disprove a claim of professional misconduct filed against a mediation party, nonparty participant, or representative of a party based on conduct occurring during a mediation, or
  - 7. Sought or offered to prove or disprove abuse, neglect, abandonment, or exploitation in a proceeding in which a child or adult protective services agency is a party.The mediator should not testify or provide documents in response to a subpoena without an order of the court if the mediator reasonably believes doing so would violate an obligation of confidentiality to the participants.

## **STANDARD VIII BEST INTERESTS OF THE CHILD**

*A family mediator shall support each party to consider the needs of each child and how to promote the child's best interests.*

- A. A mediator should have an understanding of child development and be prepared to encourage the parties to seek expert advice in the area of child development to facilitate a parenting plan that is appropriate to the child. Appropriateness in the individual situation should take into account the child's health, emotional wellbeing, care and safety while promoting stability and continuity to the greatest extent possible.
- B. The mediator should assist the parties in considering whether the child should voice his or her concerns during the mediation process through mutual agreement of the parties and in the manner least likely to cause trauma to the child, which could include actual discussion with the child, an interview by a mutually trusted professional or the mediator or by written or electronic means.
- C. A mediator should assist the parties in anticipating areas of potential conflict as the parties create a parenting plan. In addition, a mediator should encourage the parties to develop a plan to revise the plan as the needs of the child change. If safety is an issue, the mediator should assist the parties in developing a component in the parenting plan to address safety. This planning is designed to diminish the likelihood of continued conflict that impacts the parties and the child.

## **STANDARD IX CHILD NEGLECT OR ABUSE**

*A family mediator shall recognize a family situation involving child abuse or neglect and take appropriate steps to shape the mediation process accordingly.*

- A. As used in these Standards, child abuse or neglect is defined by applicable state law.
- B. During the mediation, if the mediator has reasonable grounds to believe that a child of the participants is abused or neglected, the mediator must report reasonable suspicions that a child has been subjected to abuse or neglect, unless it can be determined that such information has already been reported. The report should be made to law enforcement or the Nebraska Department of Health and Human Services.
- C. The mediator may end a mediation if allegations or threats of direct physical or significant emotional harm are made to a party or a child and have not been heard and ruled upon by the court.

## **STANDARD X DOMESTIC INTIMATE PARTNER ABUSE**

*A family mediator shall recognize a family situation involving domestic intimate partner abuse and take appropriate steps to shape the mediation process accordingly.*

- A. As used in these Standards, domestic intimate partner abuse includes domestic violence as defined by applicable state law and issues of control and intimidation.
- B. A mediator shall not undertake a mediation in which the family situation has been assessed to involve domestic intimate partner abuse without appropriate and adequate specialized alternative dispute resolution (SADR) and other necessary training.
- C. Some cases are not suitable for mediation because of safety, control or intimidation issues. A mediator shall conduct an initial Individual Private Session (IPS) with each party to screen for the existence of domestic intimate partner abuse or issues of control and intimidation which might affect a party's ability to freely negotiate and mediate. The mediator should continue to assess for domestic intimate partner abuse throughout the mediation process.
- D. The mediator shall consider taking measures to insure the safety of participants and the mediator including, among others:
  - 1. Establishing appropriate security arrangements;
  - 2. Holding separate, instead of joint sessions with the participants;
  - 3. Allowing the option of a friend, representative, advocate, counsel or attorney to attend a private mediation session or to attend a joint session;
  - 4. Encouraging the participants to be represented by an attorney, counsel or an advocate throughout the mediation process;
  - 5. Referring the participants to appropriate community resources; or
  - 6. Suspending or terminating the mediation sessions, with appropriate steps to protect the safety of the participants.

- E. The mediator should support the participants' formulation of parenting plans that protect the physical safety and psychological well-being of themselves and the child.

**STANDARD XI SUSPENSION OR TERMINATION OF PROCESS**

*A family mediator shall suspend or terminate the mediation process when the mediator reasonably believes that a participant is unable to effectively participate or for other compelling reasons.*

- A. Circumstances under which a mediator should consider suspending or terminating the mediation may include, among others:
  - 1. The safety of a participant or well-being of a child is threatened;
  - 2. A participant has or is threatening to abduct a child;
  - 3. A participant is unable to participate due to the influence of drugs, alcohol, or physical or mental condition;
  - 4. The participants are about to enter into an agreement that the mediator reasonably believes to be unconscionable;
  - 5. A participant is using the mediation to further illegal conduct;
  - 6. A participant is using the mediation process to gain an unfair advantage;
  - 7. If the mediator believes the mediator's impartiality has been compromised;
  - 8. If either or both of the participants of the mediation believe it will not be productive.
- B. If the mediator does suspend or terminate the mediation, the mediator should take all reasonable steps to minimize prejudice or inconvenience to the participants, which may result.

**STANDARD XII MEDIATION ADVERTISEMENT AND SOLICITATION**

*A family mediator shall be truthful in the advertisement and solicitation for mediation.*

- A. A mediator must honestly represent his/her credentials and the fees/costs of mediation, and when discussing mediation must truthfully explain the benefits and challenges of mediating family disputes.
- B. A mediator shall not pay commissions or give any other form of reward for referrals of a client for mediation.
- C. A mediator shall not make exaggerated claims about the mediation process, its costs and benefits, statistics about its outcome or the mediator's qualifications and abilities.

**STANDARD XIII MEDIATOR COMPETENCY**

*A family mediator shall acquire and maintain professional competence in mediation.*

- A. A competent mediator should be conversant with conflict theory and have knowledge of the range of alternative dispute resolution options.
- B. Mediators should continuously maintain, if not strive to improve, their professional skills and abilities by, among other activities, participating in relevant continuing education programs and should regularly engage in self-assessment.
- C. Mediators should participate in periodic and regular programs of peer consultation and review, including the training and mentoring of less experienced mediators.
- D. Mediators should continuously strive to understand the impact of culture and diversity on the mediator's practice.
- E. Mediators should have knowledge of and adhere to these standards of practice and ethics.