



## **CODE OF PROFESSIONAL CONDUCT FOR MEMBERS OF THE KWAZULU-NATAL SOCIETY OF MEDIATORS ("THE SOCIETY")**

### **1. MEDIATOR APPOINTMENT**

#### **1.1 Honesty**

Subject to the applicable laws and to regulations governing the professional practice of mediation, all members of the Society will present and promote their practice in a truthful way.

#### **1.2 Transparency**

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

- 1.2.1 of their relevant mediation qualifications;
- 1.2.2 that the mediator abides by the Code of Professional Conduct of the Society; and
- 1.2.3 what process will apply in the event of a party believing that the mediator has not met the standards of the stated Code of Professional Conduct. The parties should be advised that if they are not satisfied that the mediator has met the required standard of conduct, they will be at liberty to lodge a complaint with the Society.

### **2. DILIGENCE, INDEPENDENCE, NEUTRALITY, IMPARTIALITY**

#### **2.1 Diligence**

- 2.1.1 Mediators may accept an assignment to act as mediator in any situation where they consider themselves, based on reasonable grounds, competent to serve in that capacity. A mediator must decline an appointment (or withdraw as mediator) to mediate if he or she considers that a matter is beyond his or her competence or expertise.
- 2.1.2 Once an appointment as mediator has been accepted, the mediator must proceed as expeditiously as possible to commence and then to complete the mediation.
- 2.1.3 Should it at any stage appear to the mediator that there is no or little likelihood of a mediation being successfully concluded, the mediator should inform the parties in writing of this view and suggest that the mediation be terminated.

#### **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 the circumstances have been fully disclosed and addressed to the satisfaction of the parties and the mediator.

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

- a) financial or personal interests in the outcome of the mediation;
- b) existing, past or future financial, business or professional relationship with any of the parties or their representatives about which the mediator is aware;
- c) other potential sources of bias or prejudice concerning a person or institution which may affect the 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 enquiries to determine if any conflicts of interest may exist. They have a continuing duty to disclose any conflicts of interest 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 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 to the mediator continuing to act.

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 that was mediated 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**

- 3.1.1 Mediators will satisfy themselves that the parties to the mediation and their advisors understand the characteristics of the mediation process, their roles as parties and advisors, and the role of a mediator.
- 3.1.2 Mediators 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 part of the mediator and on the parties.
- 3.1.3 It is best practice for those terms to be contained in a written mediation agreement unless the parties or 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 that they will have equal opportunity to raise issues. This provision, however, does not prohibit the mediator from discussing matters of logistics relating to the mediation such as the locality, time and duration of the mediation and the costs of the mediation, including the fees of the mediator with the parties privately. In addition, it does not preclude the mediator, following an enquiry, from explaining briefly how the process of mediation works.
- 3.2.2 Mediators will explain the mediation process to the parties and their advisors and be satisfied 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 which might create or aggravate a hostile environment.
- 3.2.5 Mediators will also be satisfied that the parties have reached agreement of their own volition and knowingly consent to any resolution.
- 3.2.6 The mediator will not give the parties legal advice. The mediator will guide the discussion between the parties with the intention of them coming to settlement of their dispute. The mediator will not make any rulings, directives or orders.
- 3.2.7 A mediator must not hold undisclosed discussions with any party or his or her representative without the consent of the opposing party, provided that the mediator may, in the interest of resolving the dispute, hold discussions with the parties separately i.e. caucus separately.

- 3.2.8 The mediator may, furthermore, and if it is considered likely to further the object of the mediation, disclose to the other party information obtained in caucus provided the party so disclosing information has expressly consented to the communication of such information to the other party.
- 3.2.9 A mediator should not permit parties or their representatives to record the mediation proceedings mechanically or electronically.

### **3.3 Termination of the process**

- 3.3.1 The mediator must 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 illegal or unconscionable.

### **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 Society.

### **3.5 Fees**

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

## **4. CONFIDENTIALITY**

### **4.1 Onus on the mediator**

- 4.1.1 Mediators shall keep confidential all information acquired in the course of serving as a mediator in the mediation unless:
- a) compelled to make a disclosure by law or by a court of law; or
  - b) required under paragraph 5.1, in which event, the recipients of the confidential information shall themselves be bound to maintain the confidentiality; or
  - c) the specific information comes into the public domain (otherwise than as a result of a disclosure by the mediator); or
  - d) the parties release the mediator from the confidentiality restriction; or
  - e) necessary to defend the mediator from any proceedings or charges for which he or she 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 Procedure**

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

## **4.3 Special circumstances**

4.3.1 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 where the mediator believes 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 or the party's counsel or other advisors, to act in such a way that would remedy the situation.

4.3.2 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 Consultation**

A mediator may consult any fellow mediator of the Society about any professional or ethical dilemmas.

### **5.2 Complaints**

5.2.1 Where a mediator who is a member of the Society conducts a mediation, a party to a mediation who believes that there has been a lack of compliance with this code may activate a complaint against the member with the Society which will consider the complaint and, if necessary, institute disciplinary proceedings against the member.

5.2.2 The delegated disciplinary committee shall acknowledge receipt of a complaint within 14 days of lodgement.

5.2.3 The delegated disciplinary committee shall address a lodged complaint within 30 days of lodgement.

*Adopted at the Society's Exco meeting on 07 July 2021.*

A handwritten signature in black ink, appearing to read "Ishara Bodasing".

*Chairperson: Ishara Bodasing*