



Nairobi Centre  
for International  
Arbitration

where disputes meet resolution



# Code of Conduct for Mediators 2021

[www.ncia.or.ke](http://www.ncia.or.ke)



Co-operative Bank House,  
8th Floor, Haile Selassie Ave  
P.O Box 548-00200, Nairobi, Kenya  
Tel: +254 020-222 4029  
Mob: +254 771 293 055  
Email: [info@ncia.co.ke](mailto:info@ncia.co.ke)  
[www.ncia.or.ke](http://www.ncia.or.ke)

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## **CODE OF CONDUCT FOR MEDIATORS**

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## PREAMBLE

This Code of Conduct is designed to serve as fundamental ethical guidelines for persons appointed to mediate a dispute under the Nairobi Centre for International Arbitration (Mediation) Rules at the time in effect. They serve three primary goals: to guide the conduct of mediators; to inform the mediating parties; and to promote public confidence in mediation as a process for resolving disputes.

Mediation is a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision making by the parties to the dispute. Mediation serves various purposes, including providing the opportunity for parties to define and clarify issues, understand different perspectives, identify interests, explore and assess possible solutions, and reach mutually satisfactory agreements, when desired.

### Note on Construction

This Code of Conduct is to be read and construed in its entirety. There is no priority significance attached to the sequence in which the Principles appear. The use of the term “shall” in the Principle indicates that the mediator must follow the practice described. The use of the term “should” indicates that the practice described in the standard is highly desirable, but not required, and is to be departed from only for very strong reasons and requires careful use of judgment and discretion.

The use of the term “mediator” is understood to be inclusive so that it applies to co-mediator models. This Code of Conduct does not include specific temporal parameters when referencing mediation, and therefore, does not define the exact beginning or ending of mediation. Various aspects of mediation, including some matters covered by this Code of Conduct, 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. These sources may create conflicts with, and may take precedence over, this Code of Conduct. However, a mediator should make every effort to comply with the spirit and intent of this Code of Conduct in resolving such conflicts. This effort should include honouring all remaining Principles not in conflict with these other sources.

## **PRINCIPLE 1:** **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 any stage of mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes.

1. A mediator shall conduct a mediation based on the principle of party self-determination.
    - a. 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 this Code of Conduct.
    - b. 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.
  2. 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.
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## PRINCIPLE 2:

### Independence and Impartiality

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. 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.
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:

- 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 that Mediator's independence or impartiality or reasonably create an appearance of partiality or bias.

### PRINCIPLE 3: Conflicts of interest

A conflict of interest can arise from involvement by a mediator with the subject matter of the dispute or from any relationship between a mediator and any mediation participant, whether past or present, personal or professional, that reasonably raises a question of a mediator's impartiality.

1. A prospective mediator shall accept an appointment only if they are fully satisfied that they are able to discharge their duties without bias.
2. A mediator shall avoid a conflict of interest or the appearance of a conflict of interest during and after mediation.
3. A mediator shall make a reasonable inquiry to determine whether there are any facts that a reasonable individual would consider likely to create a potential or actual conflict of interest for a mediator. A mediator's actions necessary to accomplish a reasonable inquiry into potential conflicts of interest may vary based on practice context.
4. A mediator shall disclose, as soon as practicable, all actual and potential conflicts of interests 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.
5. If a mediator learns any fact after accepting a mediation that raises a question with respect to that mediator's service creating a potential or actual conflict of interest, the mediator shall disclose it as quickly as practicable. After disclosure, if all parties agree, the mediator may proceed with the mediation.

6. If a mediator's conflict of interest might reasonably be viewed as undermining the integrity of the mediation, a mediator shall withdraw from or decline to proceed with the mediation regardless of the expressed desire or agreement of the parties to the contrary.
7. Subsequent to a mediation, a mediator shall not establish another relationship with any of the participants in any matter that would raise questions about the integrity of the mediation. When a mediator develops personal or professional relationships with parties, other individuals or organizations following a mediation in which they were involved, the mediator should consider factors such as time elapsed following the mediation, the nature of the relationships established, and services offered when determining whether the relationships might create a perceived or actual conflict of interest.
8. A mediator shall have a continuing duty to disclose any conflicts of interests that may become apparent during the mediation process.



## PRINCIPLE 4: Competence

Training, experience in mediation, skills, cultural understandings, and other qualities are often necessary for mediator competence. A person who offers to serve as a mediator creates the expectation that the person is competent to mediate effectively.

1. A mediator shall mediate only when the mediator has the necessary competence to satisfy the reasonable expectations of the parties.
  - a. Any person may be selected as a mediator, provided that the parties are satisfied with the mediator's competence and qualifications.
  - b. A mediator should attend educational programs and related activities to maintain and enhance the mediator's knowledge and skills related to mediation.
  - c. A mediator should have available for the parties' information relevant to the mediator's training, education, experience, and approach to conducting a mediation.
2. If a mediator, during the course of a mediation determines that they cannot conduct the mediation competently, the mediator shall discuss that determination with the parties as soon as is practicable and take appropriate steps to address the situation, including, but not limited to, withdrawing, or requesting appropriate assistance.
3. If a mediator's ability to conduct a mediation is impaired by drugs, alcohol, medication or otherwise, the mediator shall not conduct the mediation.

## PRINCIPLE 5: Confidentiality

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:
  - a. compelled to make a disclosure by law, or by a court of law, or
  - b. the specific information comes into the public domain (otherwise than as a result of a disclosure by the mediator), or
  - c. the parties release the mediator from the confidentiality restriction, or
  - d. necessary to defend the mediator from any proceedings or charges for which (s) he risks incurring any liability.
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.
3. 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. 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. Reference shall be made to the Nairobi Centre for International Arbitration (Mediation) Rules, 2015 for the rule on confidentiality.

## **PRINCIPLE 6:**

### **The process**

1. The mediator shall satisfy himself/herself that the parties to the mediation understand the characteristics of the mediation process and the role of the mediator and the parties in it.
2. The mediator shall ensure that prior to commencement of the mediation, the parties have understood and expressly agreed the terms and conditions of the mediation agreement including any applicable provisions relating to obligations of confidentiality on the mediator and the parties.
3. The mediation agreement shall, upon request of the parties, be drawn up in writing.
4. The mediator shall conduct the proceedings in an appropriate manner, considering the circumstances of the case, including possible power imbalances and the rule of law, any wishes the parties may express and the need for a prompt settlement of the dispute. The parties shall be free to agree with the mediator, by reference to a set of rules or otherwise, on the manner in which the mediation is to be conducted.
5. The mediator, if he/she deems it useful, may hear the parties separately.

## **PRINCIPLE 7:**

### **Quality and fairness of the process**

1. A mediator shall conduct mediation in accordance with this Code of Conduct and in a manner that promotes diligence, timeliness, safety, presence of the appropriate participants, party participation, procedural fairness, party competency and mutual respect among all participants.

- a. A mediator should agree to mediate only when the mediator is prepared to commit the attention essential to an effective mediation.
- b. A mediator should only accept cases when the mediator can satisfy the reasonable expectation of the parties concerning the timing of mediation.
- c. The presence or absence of persons at mediation depends on the agreement of the parties and the mediator. The parties and mediator may agree that others may be excluded from particular sessions or from all sessions.
- d. A mediator should promote honesty and candor between and among all participants, and a mediator shall not knowingly misrepresent any material fact or circumstance in the course of mediation.
- e. The role of a mediator differs substantially from other professional roles. Mixing the role of a mediator and the role of another profession is problematic and thus, a mediator should distinguish between the roles. A mediator may provide information that the mediator is qualified by training or experience to provide, only if the mediator can do so consistent with this Code of Conduct.
- f. A mediator shall not conduct a dispute resolution procedure other than mediation but label it mediation in an effort to gain the protection of rules, statutes, or other governing authorities pertaining to mediation.
- g. A mediator may recommend, when appropriate, that parties consider resolving their dispute through arbitration, counseling, neutral evaluation or other processes.
- h. A mediator shall not undertake an additional dispute resolution role in the same matter without the consent of the parties. Before providing such

service, a mediator shall inform the parties of the implications of the change in process and obtain their consent to the change. A mediator who undertakes such role assumes different duties and responsibilities that may be governed by other Code of Conduct. Reference shall be made to the Nairobi Centre for International Arbitration (Mediation) Rules, 2015 for the rule on the role of a Mediator.

- i. If mediation is being used to further criminal conduct, a mediator should take appropriate steps including, if necessary, postponing, and withdrawing from or terminating the mediation.
  - j. If a party appears to have difficulty comprehending the process, issues, or settlement options, or difficulty participating in mediation, the mediator should explore the circumstances and potential accommodations, modifications or adjustments that would make possible the party's capacity to comprehend, participate and exercise self-determination.
2. If a mediator is made aware of domestic abuse or violence among the parties, the mediator shall take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.
  3. If a mediator believes that participant conduct, including that of the mediator, jeopardizes conducting mediation consistent with this Code of Conduct, a mediator shall take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.

## **PRINCIPLE 8:**

### **Advertising and solicitation**

1. A mediator shall be truthful and not misleading when advertising, soliciting or otherwise communicating the mediator's qualifications, experience, services and fees.
  - a. A mediator should not include any promises as to outcome in communications, including business cards, stationery, or computer-based communications.
  - b. 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.
2. 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.
3. A mediator shall not communicate to others, in promotional materials or through other forms of communication, the names of persons served without their permission.

## **PRINCIPLE 9:**

### **FEES AND OTHER CHARGES**

A mediator shall provide each party or each party's representative true and complete information about mediation fees, expenses and any other actual or potential charges that may be incurred in connection with mediation. Reference shall be made to the Nairobi Centre for International Arbitration (Mediation) Rules 2015 for the rule on Fees and Costs of Mediation and the Schedule of Fees.

## PRINCIPLE 10:

### Advancement of mediation practice

1. A mediator should act in a manner that advances the practice of mediation. A mediator promotes this Code of Conduct by engaging in some or all of the following:
  - a. Fostering diversity within the field of mediation.
  - b. Striving 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.
  - c. Participating in research when given the opportunity, including obtaining participant feedback when appropriate.
  - d. Participating in outreach and education efforts to assist the public in developing an improved understanding of, and appreciation for, mediation.
  - e. Assisting newer mediators through training, mentoring, and networking.
2. A mediator should 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.

## PRINCIPLE 11:

### Professional conduct issues and complaints

1. 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 with the NCIA.
2. A mediator will respond to, and co-operate with, any complaints procedure initiated by a party through NCIA in relation to the Process in which the mediator acted, including attending (without charging a fee or claiming any expenses for attending) any meeting convened by NCIA as part of that complaint's procedure.





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